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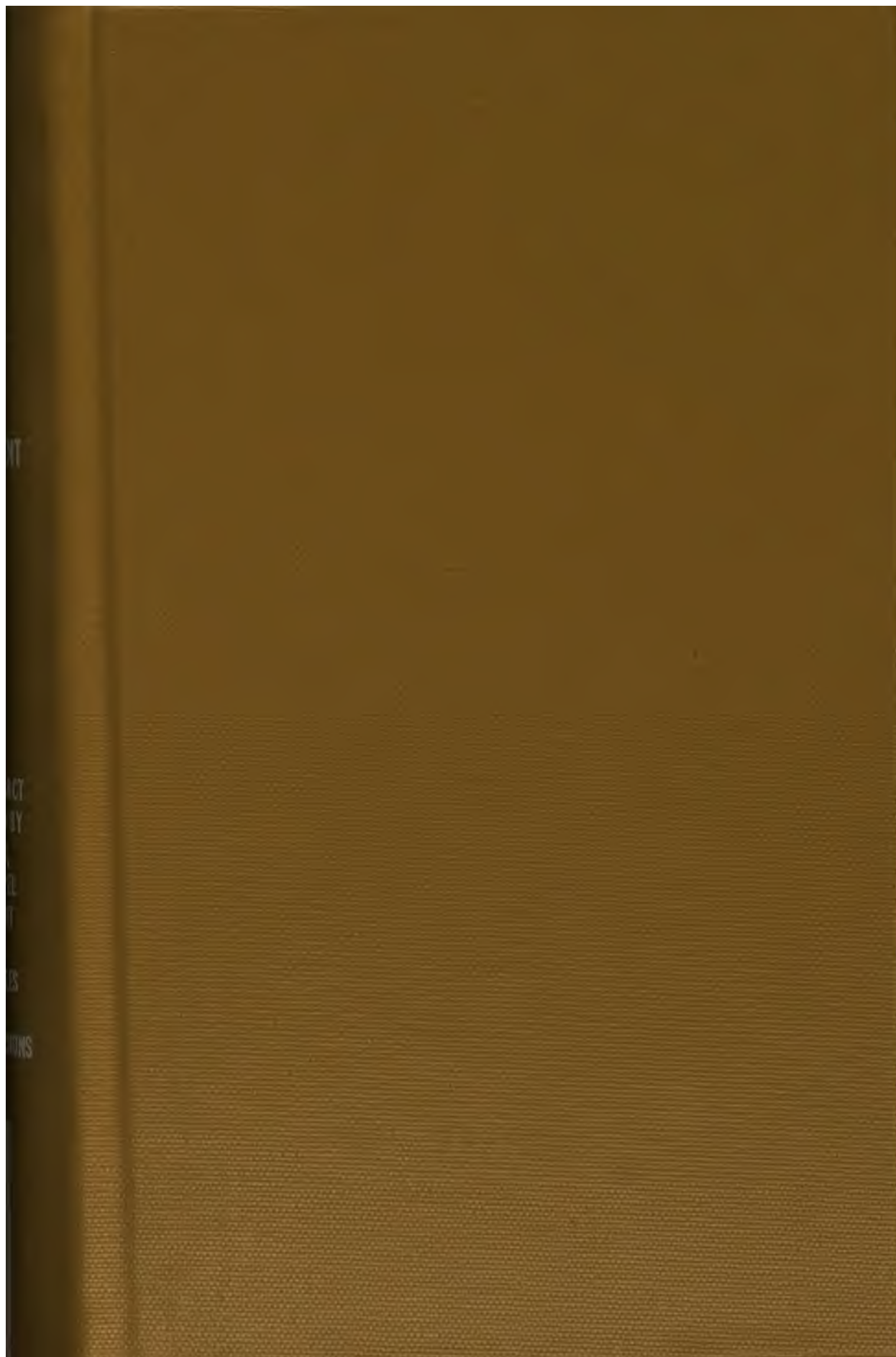
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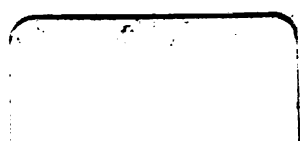
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THE LAW OF FIRE INSURANCE

BY

GEORGE A. CLEMENT

OF THE NEW YORK BAR

EDITOR OF THE NEW YORK ANNOTATED CODE OF CIVIL PROCEDURE AND
FIRE INSURANCE DIGEST

IN TWO VOLUMES.

VOL. I

AS A VALID CONTRACT IN EVENT OF FIRE AND ADJUST-
MENT OF CLAIMS THEREUNDER.

VOL. II

AS A VOID CONTRACT, AND IN BOTH VOLUMES THE
CONDITIONS OF THE CONTRACT AS AFFECTED
BY CONSTRUCTION, WAIVER, OR ESTOPPEL.

INCLUDING

MISCELLANEOUS PROVISIONS, AND AN ANALYSIS AND
COMPARISON OF THE VARIOUS STANDARD FORMS,
ALL REDUCED TO RULES, WITH THE RELE-
VANT STATUTORY PROVISIONS OF
ALL THE STATES.

VOL. I.

NEW YORK

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1905

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PREFACE.

The courts have frequently in their opinions analyzed and distinguished the conditions of the fire insurance contract into two classes: (1) Those which become operative in the event of fire upon the theory or assumption of a valid contract, and (2) those which declare it to be void in specified events. This work, now complete by the second volume; is founded upon such analysis and logical separation of the terms of the contract. The first volume treats the contract of fire insurance as valid in the event of fire, and as affected by construction and waiver or estoppel, and the adjustment of claims thereunder. Beginning with the occurrence of the fire, it considers the various matters in their natural ordinary order and sequence, and at the end contains the general rules of construction, and of waiver or estoppel applicable to the entire contract or both classes of conditions. This volume also contains the various standard forms, and a table of the statutes in chronological order under which the same were adopted or prescribed.

The second volume treats the contract as void, taking as a basis those conditions declaring it to be void in specified instances, and clearly separating those which relate to interest or title, and to use or occupation. It also contains at the end a chapter devoted to miscellaneous provisions or matters not elsewhere covered, such as cancellation, agents, reformation, oral or parol contracts, etc. Of these, one of the most valuable in the entire work is that under the title of "Agents," specially in connection with the rules under the several subjects, and the general rules of construction and of waiver or estoppel in the first volume.

This work is not a digest nor is it a treatise, as these words are ordinarily understood and applied. In treatment and

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printing there is a radical departure from stereotyped methods, obvious in examination and comparison. Out of all the existing confusion and chaos, the several subjects are reduced to a series of logical, comprehensive, yet, as far as possible, clear, and concise rules, which have been either expressed or recognized of force by the courts. In each instance the particular rule is preceded by an analytical statement of its subject-matter. The rules reflect the minds of the judges upon whose opinions juries are instructed and final judgments are entered. There is not a line written or altered in the entire work to please either the insured or the insurance companies. It is absolutely impartial and independent. Each subject is preceded with the rule as imposed by contract, including an analysis of the various standard forms, and pointing out the difference, if any, in language. It has been the object to bring out *practical rules affecting conduct*, in clear, sharp, and distinct relief, based on logical analysis. The text of these rules is founded on the opinions of the courts, and is not burdened and clouded with the individual views and opinions of the author as to what the law or rules ought to be. Their correction, modification, or alteration is left to the proper tribunal or authority. When there is a conflict in the rules it is sharply defined or indicated, either in express language of the rules themselves or in notes. A comparison or combination of the rules under any particular condition or subject, which includes construction, and waiver or estoppel applicable to that subject, with the rules under "Agents" and the general rules of construction and of waiver or estoppel at end of the first volume, together with the statutory provisions of the different States, all brought within convenient reach and view for consideration will indicate in a given instance and in any location or State the safest and most correct specific rule of conduct in the particular case. The entire work is consequently and necessarily of equal value in any part of the United States.

In every question that arises in case of fire, from the time of its occurrence until adjustment and payment, or in the

PREFACE.

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event of a continuance of a dispute, until final decision by the highest court to which the controversy can be submitted, the rules in these volumes will be found applicable.

The first volume has now been altered, revised, and reprinted, so that in both volumes the cases and statutes of the various States are inserted so far as published to about the middle of August, 1905. As the sessions of the appellate courts are not usually resumed before October, and their decisions published before the latter part of that month, the entire work is now up to date. The blanks to be occasionally found indicate that the case is not yet published in the official State report.

The writer desires to express his acknowledgment to the insurance superintendents or officers of the different States, who have so courteously supplied him with information and copies of many of the laws, and acknowledgment is also due to Mr. E. F. Beddall, general attorney of the Royal Insurance Company for the United States, for copies of the standard forms prescribed and in use, and of the riders in occasional or general use; and to Mr. R. J. Taylor, manager of the loss department of the Continental Insurance Company of New York, for the useful and valuable form of statement of loss of stocks of merchandise to be found in the title "Amount of Loss or Damage," in Volume I, under Rule 21, page 101.

NEW YORK, *September*, 1905.

GEORGE A. CLEMENT.

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FIRE INSURANCE

AS A

VALID CONTRACT IN EVENT OF FIRE AND AS AFFECTED
BY CONSTRUCTION AND WAIVER, OR ESTOPPEL,
AND THE ADJUSTMENT OF LOSSES AND CLAIMS
THEREUNDER, REDUCED TO RULES.

CHAPTER FIRST.

**Duty of the Insured at Time of Fire and Subsequent
Thereeto.**

- TITLE**
1. Duty to save and preserve property.
 2. Duty to give notice of loss.
 3. Duty to protect property from further damage.
 4. Duty to separate the damaged and undamaged property, put in order, inventory, and exhibit remains.

TITLE I.

Duty to Save and Preserve Property.

- RULE 1.** Duty to save and preserve property imposed by contract.
2. Standard of care.
 3. Interference by insured.
 4. Duty to save life superior.
 5. Effect of failure to perform duty — Burden of proof — Must be in power of assured.

RULE I.

Duty to Save and Preserve Property Imposed by Contract.

The company shall not be liable for loss caused by neglect of the insured to use all reasonable means to

save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises.

The duty to save and preserve is imposed, by above terms, in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

By the standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

the same duty is imposed in following language:

"If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Standard of Care.

The standard of care is not fixed either by contract or by law, but that degree of care, caution, or effort is incumbent upon the assured which might reasonably be expected of an ordinarily prudent person under like circumstances and conditions.

Price v. Patrons' Home Protection Co., 77 Mo. App. 236.

* While the statute under which the legislature of Pennsylvania authorized the adoption of the standard form has been held by the Supreme Court of that State to be unconstitutional and void, the New York standard form continues in general use in that State. *O'Neill v. American Ins. Co.*, 166 Pa. St. 72, 30 Atl. Rep. 943. See "Construction," Rule 1.

RULE 3.

Interference by Assured.

Interference by the assured with efforts of others to extinguish the fire and save property, constitutes a violation of his duty to "save and preserve."

Phoenix Ins. Co. v. Mills, 77 Ill. App. 546.

RULE 4.

Duty to Save Life Superior.

The duty of caring for the members of assured's family or to save life is superior to that imposed by contract to save and preserve property, and when the proper performance of the former duty prevents attention to the latter, assured is not chargeable with neglect to save and preserve property.

Raymond v. Farmers' Ins. Co., 114 Mich. 386, 72 N. W. Rep. 254; Citizens' Ins. Co. v. Bland, 39 S. W. Rep. 825, 26 Ins. L. J. (Ky.) 615.

RULE 5.

Effect of Failure to Perform Duty — Burden of Proof — Must be in Power of Assured.

Failure to perform the duty to save and preserve property does not of itself cause a forfeiture of the policy; the consequence is that the assured cannot recover to extent of loss or damage caused by his neglect to use all reasonable means to save and preserve; it is ordinarily a question of fact, and the burden of establishing such a defense rests upon the insurance company;¹ such duty does not exist unless in the power of assured to act in saving or preserving.²

1. Wolters v. Western Assurance Co., 95 Wis. 265, 70 N. W. Rep. 62; Ellsworth v. Aetna Ins. Co., 89 N. Y. 186; Fletcher v. German-American Ins. Co., 79 Minn. 338, 82 N. W. Rep. 647; German-American Ins. Co. v. Brown, Ark. , 87 S. W. Rep. 135.

2. Aurora Ins. Co. v. Johnson, 46 Ind. 316, 326.

TITLE II.

Duty to Give Notice of Loss.

- RULE** 1. Duty of insured to give notice of loss imposed by contract.
2. Notice required when damage by lightning or cyclone.
 3. Notice required by a statute.
 4. Meaning of word "immediate"—As a question of fact or law.
 5. Proof of loss as notice of loss.
 6. Notice, by whom given.
 7. Notice by mail.
 8. Notice, when not immediate.
 9. Waiver of notice.
 10. Authority of local agent — Waiver.
 11. Death of insured does not dispense with necessity of notice.

RULE 1.

Duty of Insured to Give Notice of Loss Imposed by Contract.

If fire occur the insured shall give immediate notice of any loss thereby in writing to the insurance company.

This duty is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

By the standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	

there is no specific requirement as to notice of loss.

The standard form in New Hampshire requires notice from the insured "in writing, to the secretary, a director, or an agent of the company, within thirty days."

In South Dakota "the insured shall promptly give notice" of loss or damage.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

While there is no set or prescribed form of giving notice of a loss, it should be given in writing, stating the occurrence of the fire, the date, and that claim is made for loss under policy No. (inserting its number where possible to do so); it should be addressed to and given to the company at its home office, or at office of its general agent, who is authorized to receive and act upon it in the territory where fire occurs; at same time a duplicate notice should be given to the local agent who issued the policy; if the mail is used for the purpose, the letter or notice should be registered. The notice, when required to be in writing, must be so given if not waived.

Patrick v. Farmers' Ins. Co., 43 N. H. 621. And see Rules 9 and 10.

RULE 2.

Notice Required when Damage by Lightning or Cyclone.

Rule 1 requiring notice of loss may not be construed to require immediate notice in case of damage by lightning or cyclone when liability therefor assumed, unless fire occurs.

Epiphany Church v. German Ins. Co., 16 S. D. 17, 91 N. W. Rep. 332.

RULE 3.

Notice Required by a Statute.

A notice of loss given as prescribed by a statute is sufficient, though not in compliance with terms of the policy.

Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. Rep. 717.

RULE 4.

Meaning of Word "Immediate" — As a Question of Fact or Law.

The word "immediate" does not mean "instantly;" immediate notice is notice within a reasonable time; and this is determinable from the situation

of the insured and the circumstances by which he was surrounded; due diligence, under the circumstances, without unnecessary and unreasonable delay, is what is required;¹ it is ordinarily a question of fact;² but where the circumstances are not in dispute, it may be a question of law.³

1. *Solomon v. Continental Ins. Co.*, 160 N. Y. 595, 55 N. E. Rep. 279, affg. 28 App. Div. 213; *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, affd. without opinion, 162 N. Y. 597; *Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. Rep. 865; *Insurance Co. of N. A. v. Brim*, 111 Ind. 281, 12 N. E. Rep. 315; *Carey v. Farmers' Ins. Co.*, 27 Oreg. 146, 40 Pac. Rep. 91; *Cashan v. Northwestern Nat. Ins. Co.*, 5 Biss. 476 (U. S. Cir.); *Continental Ins. Co. v. Lippold*, 3 Neb. 391; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Niagara Ins. Co. v. Scammon*, 100 Ill. 644; *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553; *Donahue v. Windsor Mut. Ins. Co.*, 56 Vt. 374; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362; *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N. W. Rep. 647; *Pennypacker v. Capitol Ins. Co.*, 80 Iowa, 56; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; *Capitol Ins. Co. v. Wallace*, 50 Kan. 453.

2. *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *Griffey v. New York Central Ins. Co.*, 100 N. Y. 417. And see preceding cases under note 1.

3. *Bennett v. Lycoming Ins. Co.*, 67 N. Y. 274; *Donahue v. Windsor Ins. Co.*, 56 Vt. 374; *Insurance Co. of N. A. v. Brim*, 111 Ind. 281, 12 N. E. Rep. 315.

RULE 5.

Proof of Loss as Notice of Loss.

A statement or proofs of loss may be effective as a notice of loss, if furnished *in time*, so as to be "immediate," as construed under preceding rules; if furnished late so as to be objectionable as a notice of loss, the objection should be promptly and specifi-

cally made; otherwise it may be waived either by failure to make the specific objection, or that together with action of the company in requiring amendments to the proofs or in putting assured to expense in complying with other conditions in the policy.

Weed *v.* Hamburg-Bremen Ins. Co., 133 N. Y. 395, 407, 31 N. E. Rep. 231. And see Bear *v.* Atlanta Home Ins. Co., 34 Misc. 613, 70 N. Y. Supp. 581; Purcell *v.* St. Paul F. & M. Ins. Co., 5 N. D. 100, 64 N. W. Rep. 943; Ermentraut *v.* Girard Ins. Co., 63 Minn. 305, 65 N. W. Rep. 635; Hartford Ins. Co. *v.* Redding, Fla., 37 So. Rep. 62. See Statement or Proof of Loss.

RULE 6.

Notice, by Whom Given.

While the notice should be signed and given by the assured when possible in prompt compliance with the condition, it may be signed and given by a third party as agent;¹ by any person interested in the insurance;² by an assignee;³ or by the legal representatives of the insured;⁴ and the local agent of the company may be made the agent of the assured in sending the notice.⁵

1. O'Brien *v.* Phoenix Ins. Co., 76 N. Y. 459; Stimpson *v.* Monmouth Ins. Co., 47 Me. 379.

2. Watertown Ins. Co. *v.* Grover & Baker Machine Co., 41 Mich. 131; Farmers' Ins. Co. *v.* Graybill, 74 Pa. St. 17.

3. Cornell *v.* Le Roy, 9 Wend. 163; Watertown Ins. Co. *v.* Grover & Baker Machine Co., *supra*.

4. Matthews *v.* American Central Ins. Co., 154 N. Y. 449, 48 N. E. Rep. 751, affg. 9 App. Div. 339.

5. Loeb *v.* American Central Ins. Co., 99 Mo. 50; Stimpson *v.* Monmouth Ins. Co., *supra*; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289.

RULE 7.

Notice by Mail.

Sending notice by mail only raises a presumption of its receipt or service, which may be denied.¹ De-

posit in mail is not notice to the insurance company, unless received.²

1. *Susquehanna Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; *Plath v. Minnesota Ins. Co.*, 23 Minn. 479; *Munson v. German-American Ins. Co.*, W. Va. , 47 S. E. Rep. 160.

2. *Central City Ins. Co. v. Oates*, 86 Ala. 558. And see *Peabody v. Satterlee*, 166 N. Y. 174, 59 N. E. Rep. 818; *Best v. German Ins. Co.*, 68 Mo. App. 598.

RULE 8.

Notice, When Not Immediate.

Where there is no sufficient excuse or reasonable explanation of delay in giving notice of a loss, such notice cannot be regarded as immediate when given *eleven*¹ days after the fire; or *sixteen*² days; *eighteen*³ days; *nineteen*⁴ days; *twenty*⁵ days; *forty-eight*⁶ days; *sixty*⁷ days; the word "immediate," under such circumstances, is more strictly construed and applied.

1. *Trask v. State Ins. Co.*, 29 Pa. St. 198.

2. *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394.

3. *Edwards v. Insurance Co.*, 75 Pa. St. 378.

4. *Weed v. Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 407, 31 N. E. Rep. 231.

5. *Manchester Ins. Co. v. Guerin* Rap. Jud. Quebec, 5 B. R. 434.

6. *Brown v. London Assurance Co.*, 40 Hun, 101.

7. *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635. And see *Lake Geneva Ice Co. v. Selvage*, 36 Misc. 212, 73 N. Y. Supp. 193. And a delay of *six* days has been held not to be "immediate." *Railway Ins. Co. v. Burwell*, 44 Ind. 460.

RULE 9.

Waiver of Notice.

When notice is not given in proper or sufficient time, failure of the company to object on that ground; or its silence, cannot be construed as a waiver;¹ but when

the company acts on such notice in negotiating with the insured there may be a waiver.²

1. *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Bennett v. Lycoming Ins. Co.*, 67 N. Y. 274; *Donahue v. Windsor Ins. Co.*, 56 Vt. 374.

2. *Lycoming Ins. Co. v. Schuffler*, 42 Pa. St. 188; *Weed v. Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. Rep. 231. And see cases under Rule 10, note 2.

RULE 10.

Authority of Local Agent — Waiver.

A local agent authorized to fill up, countersign, and issue policies, in absence of evidence clothing him with apparent authority beyond such actual authority, does not bind the company in receipt, acceptance, or waiver of a notice of loss;¹ if, however, such a notice, whether originally verbal or written, is communicated or transmitted to the company by such agent, and the company *acts* upon it by sending an adjuster or special agent, it operates either as a waiver of written notice, or as sufficient notice;² notice in writing is waived by acting on a verbal notice.³

1. *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635; *Edwards v. Insurance Co.*, 75 Pa. St. 378; *Bush v. Westchester Ins. Co.*, 63 N. Y. 531; *Hicks v. British America Ins. Co.*, 162 N. Y. 284, 294; *Lohms v. Insurance Co. of N. A.*, 121 Mass. 439. And see "Statement or Proof of Loss," Rule 35.

2. *Welsh v. London Assurance Co.*, 151 Pa. St. 607, 25 Atl. Rep. 142; *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, affd. without opinion, 157 N. Y. 685; *Partidge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, affd. without opinion, 162 N. Y. 597; *Phoenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. Rep. 67; *Coffman v. Niagara Ins. Co.*, 57 Mo. App. 647; *Loeb v. American Central Ins. Co.*, 99 Mo. 50, 12 S. W. Rep. 374; *Germania Ins. Co. v. Stewart*, 13 Ind. App. 627, 640, 42 N. E. Rep. 286, 290; *Robinson v. Aetna Ins. Co.*,

128 Ala. 477, 30 So. Rep. 665; Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kans. App. 527, 51 Pac. Rep. 567; Willis v. Germania Ins. Co., 79 N. C. 285; Home Ins. Co. v. Myer, 93 Ill. 271; Graves v. Merchants' Ins. Co., 82 Iowa, 637, 49 N. W. Rep. 65. And as to communication of a notice of loss to the company, through its local agent, see also Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. Rep. 383; Powers v. New England Ins. Co., 68 Vt. 390, 35 Atl. Rep. 331; Oakland Home Ins. Co. v. Davis (Tex.), 33 S. W. Rep. 587; Omaha Ins. Co. v. Dierke, 43 Neb. 569, 61 N. W. Rep. 740, 745.

3. Thompson v. Traders' Ins. Co., 169 Mo. 12, 68 S. W. Rep. 889; McClelland v. Greenwich Ins. Co., 107 La. 124, 30 So. Rep. 691; Petit v. German Ins. Co., 98 Fed. Rep. 800.

In California service of notice on the agent who *countersigned* the policy appears to be sufficient. Bemero v. South British & National Ins. Co., 65 Cal. 386.

A local agent may be clothed with apparent authority to receive the notice. Kendall v. Holland Purchase Ins. Co., 2 T. & C. 375, *affd.* without opinion, 58 N. Y. 682; Van Allen v. Farmers' Ins. Co., 10 Hun, 397, *affd.*, 72 N. Y. 604. And see Snyder v. Dwelling-House Ins. Co., 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905, *revg.* 59 N. J. L. 18, 34 Atl. Rep. 931, 25 Ins. L. J. 715.

RULE II.

Death of Insured Does Not Dispense with Necessity of Notice.

Death of the insured does not dispense with the necessity of giving notice of loss; it is the duty of executor named in a will, even before probate, or of some one interested as legal representative, heir, or legatee, or otherwise, to comply with the condition in accordance with Rule 4.

Matthews v. American Central Ins. Co., 9 App. Div. 339, *affd.*, 154 N. Y. 449, 48 N. E. Rep. 751.

TITLE III.

Duty to Protect Property from Further Damage.

- RULE 1.** Duty to protect property from further damage imposed by contract.
2. Company not liable for increased damage caused by assured's neglect to perform duty — Limitation.
 3. Duty of assured extends to buildings and walls.
 4. Duty of assured as to vessel or boat — Total loss.

RULE 1.

Duty to Protect Property from Further Damage Imposed by Contract.

Property must be protected by the insured from further damage.

This duty is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

By the standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

this specific clause is omitted but is substantially covered by the duty imposed under "Duty to Save and Preserve," Rule 1.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Company not Liable for Increased Damage Caused by Assured's Neglect to Perform Duty — Limitation.

The insurance company is not liable for such further damage when caused by failure or neglect of the in-

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

sured to comply with preceding rule; as, for instance, the further or increased damage caused by omission of the insured to dry or clean the property wet by water;¹ but this rule does not require use of means to restore to condition before the fire.²

1. *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. Rep. 804.

2. *Hoffman v. Aetna Ins. Co.*, 1 Robt. 501, *affd.*, 32 N. Y. 405.

RULE 3.

Duty of Assured Extends to Buildings and Walls.

The duty of insured to protect from further damage is not confined to personal property, but extends to buildings or their walls.

Alter v. Home Ins. Co., 50 La. Ann. 1316, 24 So. Rep. 180.

RULE 4.

Duty of Assured as to a Vessel or Boat—Total Loss.

It is the duty of insured to raise a vessel damaged and sunk in progress of a fire, and protect it from further damage; if the insurance company, on assured's request, raise the boat, the expense is properly deducted from claim on the policy;¹ but a total loss may, however, be established by proper competent testimony without raising the vessel.²

1. *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627.

2. *Jackson v. British America Assur. Co.*, 106 Mich. 47, 63 N. W. Rep. 899.

The application of this rule obviously depends upon the condition of the vessel at time of sinking.

The responsibility for expenses in raising a vessel was involved in *Fire Ins. Assoc. v. Wickham*, 141 U. S. 565, but owing to defective record was neither considered nor decided.

TITLE IV.**Duty to Separate Damaged and Undamaged Property,
Inventory, and Exhibit Remains.**

- RULE 1.** Duty of insured to separate damaged and undamaged personal property, inventory and exhibit remains as imposed by contract.
2. Inventory distinct from proof of loss.
 3. Object of separation and inventory — Effect of failure to perform duty.
 4. Expense rests upon assured — Performance not required when damage trifling.
 5. Substantial compliance sufficient.
 6. Performance not required when property totally destroyed — When not practicable.
 7. Insured may dispose of damaged property after reasonable notice.

RULE 1.**Duty of Insured to Separate Damaged and Undamaged Personal Property, Inventory and Exhibit Remains as Imposed by Contract.**

If fire occur the insured shall forthwith separate the damaged and undamaged personal property, put it in the best possible order, and make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon. The insured, as often as required, shall exhibit all that remains of the property described.

This duty is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

This duty is not required in the standard form prescribed in :

Maine,
Massachusetts,
Minnesota,

New Hampshire,
South Dakota.

See *Clement v. British America Ins. Co.*, 141 Mass. 298, 5 N. E. Rep. 847. Under New Hampshire form, the company has right of "access to premises and property damaged."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

The word "forthwith" in above rule under well-settled principles of construction means as soon as reasonably possible under the circumstances.

RULE 2.

Inventory Distinct from Proof of Loss.

The inventory required is separate and distinct from the statement or proof of loss.

Clemens v. American Ins. Co., 70 App. Div. 435, 75 N. Y. Supp. 484.

See "Statement or Proof of Loss."

RULE 3.

Object of Separation and Inventory—Effect of Failure to Perform Duty.

The object of the separation, order, and inventory being to enable the insurance company or its representative to estimate the loss, the assured cannot immediately after the fire sort out or separate the undamaged property, sell it, and ship it, before the arrival of the company's adjuster, without violating the condition;¹ it is the duty of assured to separate damaged and undamaged property, and if he fails in performance it may affect his right to recovery.²

1. *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510, 66 N. W. Rep. 525.

2. *Thornton v. Security Ins. Co.*, 117 Fed. Rep. 773.

RULE 4.

Expense Rests upon Assured — Performance not Required when Damage Trifling.

The expense of putting in best possible order rests upon the insured; if this work is done by the insurance company, at express request of the insured, the expense is properly deducted from the claim under the policy for the insurance;¹ but putting in order is not required when the value of the property is trifling in amount, and there is no proof that its value would be improved.²

1. *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627, affg. 55 Ill. App. 275.

2. *Wright v. Hartford Ins. Co.*, 36 Wis. 522.

RULE 5.

Substantial Compliance Sufficient.

Substantial compliance with Rule 1 is sufficient; an inventory otherwise sufficiently specific is not invalidated by the fact that it contains a few items of a collective character; as, for instance, "a lot of goods in a show window," "contents of a small show case," "a lot of shirt bosoms, handkerchiefs," etc.,¹ or if unable to give cost of each article, number of articles of each kind may be given with average price.²

1. *Boyle v. Hamburg-Bremen Ins. Co.*, 169 Pa. St. 349, 32 Atl. Rep. 553.

2. *People's Fire Ins. Co. v. Pulver*, 127 Ill. 246, 20 N. E. Rep. 18.

RULE 6.

Performance not Required when Property Totally Destroyed — When not Practicable.

When property insured is totally destroyed, an inventory of each item thereof is not required; Rule 1

has reference to damaged and undamaged property,¹ and the inventory is not required where the goods are so damaged as to render the making of the inventory not reasonably practicable;² or when there is only one article damaged.³

1. *Johnston v. Farmers' Ins. Co.*, 106 Mich. 96, 64 N. W. Rep. 5; *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, affd. without opinion, 157 N. Y. 685.

2. *Powers Dry Goods Co. v. Imperial Ins. Co.*, 48 Minn. 380, 51 N. W. Rep. 123.

3. *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. Rep. 804.

RULE 7.

Insured may Dispose of Damaged Property after Reasonable Notice.

Insured may proceed to dispose of and sell damaged property after giving reasonable notice to the insurance company, which takes no action and makes no reply in reasonable time;¹ but assured has no right to make such disposition when notified in reasonable time of the company's desire to further examine the property, and the company's rights are not waived by the fact of a prior examination.²

1. *Chainless Cycle Co. v. Security Ins. Co.*, 52 App. Div. 104, 64 N. Y. Supp. 1060, affd., 169 N. Y. 304, 62 N. E. Rep. 392. And see "Appraisal," Rule 2; "Options of the Insurance Company," Title 1, Rule 4.

2. *Astrich v. German-American Ins. Co.*, 131 Fed. Rep. 13, C. C. A. , affg. 128 Fed. Rep. 477.

CHAPTER SECOND.

Parties to the Fire Insurance Contract and to the Adjustment of the Loss — Adjuster and Adjustment.

- TITLE 1.** Parties to the fire insurance contract.
2. Legal representatives.
 3. Mortgagor and mortgagee.
 4. Adjuster and adjustment.

TITLE I.

Parties to the Fire Insurance Contract.

- RULE 1.** Fire insurance personal contract of indemnity—
Does not extend to other persons or interests without language indicating such intention.
2. Individuals insured as a company — Corporation.
 3. Contract with infant.
 4. Property for which assured liable.
 5. Receiver.
 6. Account of whom it may concern.
 7. Property held in trust.
 8. Property under conditional contract of sale.
 9. Insurance of an estate.
 10. Policy in name of deceased owner — Wrong name.
 11. Name of estate, loss payable to widow.
 12. Wrong name — Reformation.
 13. Meaning of words "As Interest may Appear."
 14. Policy issued to two persons as interest may appear.
 15. Burden of proof as to interest.
 16. Distinction between insurance of interest as it may appear and making loss payable as may appear.
 17. Effect of making loss payable to a third party.
 18. Policy assignable after fire.

RULE 1.

Fire Insurance Personal Contract of Indemnity Does not Extend to other Persons or Interests Without Language Indicating such Intention.

The contract of fire insurance is one of indemnity, personal to the insured, and does not extend to an-

other person or interest without language in or on the policy consenting to same, or covered and included in the description of the insured or the property;¹ while an agent may take out a policy in his own name, for benefit of owner, without giving name of the owner, the language of the policy must sufficiently indicate the intention.²

1. *Whitehouse v. Cargill*, 88 Me. 479, 34 Atl. Rep. 276; *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Carroll v. Boston Ins. Co.*, 8 Mass. 515; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 553, 54 N. E. Rep. 772; *Lindley v. Orr*, 83 Ill. App. 70; *Continental Ins. Co. v. Maxwell*, 9 Kans. App. 268, 60 Pac. Rep. 539; *Quarles v. Clayton*, 87 Tenn. 308; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82; *McLaughlin v. Park City Bank*, 22 Utah, 473, 63 Pac. Rep. 589; *Skinner Ship-Building Co. v. Houghton*, 92 Md. 68, 48 Atl. Rep. 85; *Matter of West Norfolk Lumber Co.*, 112 Fed. Rep. 759; *Foley v. Farragut Ins. Co.*, 71 Hun, 369, 24 N. Y. Supp. 1131; *Wyman v. Prosser*, 36 Barb. 368, *affd.*, 26 N. Y. 253; *Farmers & Merchants' Ins. Co. v. Jensen*, 56 Nebr. 284, 76 N. W. Rep. 577, 78 N. W. Rep. 1054; *Cummings v. Insurance Co.*, 55 N. H. 457; *Kase v. Hartford Ins. Co.*, 58 N. J. L. 34, 32 Atl. Rep. 1057; *Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350. And see *Bishop v. Clay Ins. Co.*, 45 Conn. 430; *Duncan v. Sun Mutual Ins. Co.*, 12 La. Ann. 486; *Lee v. Adsit*, 37 N. Y. 78; *Harvey v. Cherry*, 76 N. Y. 436; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 720; *St. Paul F. & M. Ins. Co. v. Kelly*, 43 Kans. 741, 23 Pac. Rep. 1046; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

2. *Plahto v. Merchants' Ins. Co.*, 38 Mo. 248; *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352, 41 N. W. Rep. 39. And see *Lee v. Adsit*, 37 N. Y. 78; *Goodall v. New England Ins. Co.*, 5 Fost. (N. H.) 169; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553; *Freeman v. Fulton Ins. Co.*, 38 Barb. 247; *Marts v. Cumberland Ins. Co.*, 44 N. J. L. 478; *New Orleans Ins. Co. v. Spruance*, 18 Ill. App. 576; *Waring v. Indemnity Co.*, 45 N. Y. 606; *Trade Ins. Co. v. Barraciff*, 45 N. J. L. 543; *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. Rep. 862, *revg.* 102 Fed. Rep. 919, 43 C. C. A. 55; *Bennett v. Featherstone*, 110 Tenn. 27, 71 S. W. Rep. 589; *Scottish Union & National*

Ins. Co. v. Hagan, 43 C. C. A. 55, 102 Fed. Rep. 919; *Pelican Ins. Co. v. Smith*, 107 Ala. 313, 18 So. Rep. 105, previous appeal, 92 Ala. 428; *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S. W. Rep. 711; *Union Ins. Co. v. McCullough*, Neb. , 96 N. W. Rep. 79.

There is a material distinction between the *existence* of an *insurable* interest, and an insurable interest *insured* by a policy in question. An insurable interest does not depend upon ownership or title, and may exist whenever the person or party is so situated in reference to the property that he will suffer a pecuniary loss if it is damaged or destroyed.

Berry v. American Central Ins. Co., 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; *Harvey v. Cherry*, 76 N. Y. 436; *Helvetia Swiss Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. Rep. 242; *Hanover Ins. Co. v. Bohn*, 48 Nebr. 743, 67 N. W. Rep. 774, 25 Ins. L. J. 681; *Graham v. American Ins. Co.*, 48 S. C. 195, 26 S. E. Rep. 323, 26 Ins. L. J. 744; *Hebner v. Palatine Ins. Co.*, 55 Ill. App. 275; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. Rep. 460, 23 Ins. L. J. 624; *Creed v. Sun Fire Office*, 101 Ala. 522, 14 So. Rep. 323, 23 Ins. L. J. 461; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 49 N. E. Rep. 754, 27 Ins. L. J. 459; *Hope Oil-Mill Compress Co. v. Phoenix Ins. Co.*, 74 Miss. 320, 21 So. Rep. 132, 26 Ins. L. J. 995.

If the insurable interest is other than unconditional sole ownership, the policy should contain language indicating intent to include or insure it, and such interest should be therein truly stated.

See the various standard forms of policy in chapter twelfth.

This subject will be more fully treated in a subsequent volume.

RULE 2.

Individuals Insured as a Company — Corporation.

The fact that individuals are insured in a corporate name or as a company, when not incorporated, does not of itself affect the insurance on that ground;¹ and an insurance company cannot avoid payment of a loss simply by denying corporate existence of the

insured under a defective charter granted under a general law.²

1. *Holbrook v. St. Paul Ins. Co.*, 25 Minn. 229; *Clark v. German Ins. Co.*, 7 Mo. App. 77.

2. *Bon Aqua Imp. Co. v. Standard Ins. Co.*, 34 W. Va. 764, 12 S. E. Rep. 771.

RULE 3.

Contract with Infant.

An insurance company is bound by its contract with an infant; in such a case infancy is no defense to a claim under the policy.

Monaghan v. Agricultural Ins. Co., 53 Mich. 238; *Johnson v. Scottish Union & National Ins. Co.*, 93 Wis. 223, 67 N. W. Rep. 416; *Mead v. Phoenix Ins. Co.*, Kans. , 75 Pac. Rep. 475.

RULE 4.

Property for Which Assured Liable.

Where policy covers property "for which the assured may be liable," the word "liable" does not mean a perfected or fixed legal liability, but simply a condition out of which a liability might arise, based on some duty which the insured owed to the owner of the property; in such a case the assured may recover the entire value or loss, holding the excess over his own interest for benefit of the owner.

Home Ins. Co. v. Peoria & Pekin R. Co., 178 Ill. 64, 52 N. E. Rep. 862, affg. 78 Ill. App. 137; *Burke v. Continental Ins. Co.*, App. Div. , 91 N. Y. Supp. 402. And see *Allen v. Royal Ins. Co.*, Tex. Civ. App. , 49 S. W. Rep. 931; *Germania Ins. Co. v. Anderson*, 15 Tex. Civ. App. 55, 40 S. W. Rep. 200, 27 Ins. L. J. 267; *Phoenix Ins. Co. v. Belt R. Co.*, 182 Ill. 33, 54 N. E. Rep. 1046; *Minn., St. P. & M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. Rep. 815, 23 Ins. L. J. 68; *Home Ins. Co. v. Railroad Co.*, 71 Minn. 296, 74 N. W. Rep. 140. And as to subrogation to carrier's rights, that there is none, see *Id.*

RULE 5.**Receiver.**

When policy insures "E. S. K., receiver for, on their one-half interest," etc., the interest of the parties appears on the face of the policy, and no reformation is required to enable the successor of the receiver to sue thereon as representative of the interest intended to be insured.

Steel v. Phoenix Ins. Co., 51 Fed. Rep. 715, 22 Ins. L. J. 7, 2 C. C. A. 463.

RULE 6.**Account of Whom it may Concern.**

Where the policy is issued to the manager of a warehouse or factor for account of whom it may concern, the intention is that it shall cover to the amount of insurance named therein any goods of the character and description specified in the policy, which from time to time during its continuance might be in the warehouse under the control of its manager. In such a case the policy applies for the benefit of the person who may own the property at the time of the loss, although he had no interest in the property when the policy was issued; and extrinsic evidence is admissible to show who was in fact concerned. The manager may institute the suit to recover total value of the goods destroyed and out of the recovery pay himself to the extent of his interest and the balance he holds as trustee or for the benefit of the owner or owners;¹ and so where a carrier or transportation company is insured for account of whom it may concern;² and so when

any one is also insured for account of whom it may concern,³ or as representative of other interests.⁴

1. *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 25 Ins. L. J. 649, 24 S. E. Rep. 464; *Smith v. Carmack*, 64 S. W. Rep. 372, Tenn. Ch., affd. orally by Sup. Ct.; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; *Fish v. Seeberger*, 154 Ill. 30, 61 N. W. Rep. 681.

2. *Fire Ins. Assoc. v. Merchants' Transportation Co.*, 66 Md. 339.

3. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Mayor v. Hamilton*, 10 Bosw. 537, affd., 39 N. Y. 45; *Earmoor v. California Ins. Co.*, 40 Fed. Rep. 847.

4. *Hope Oil-Mill Compress Co. v. Phoenix Ins. Co.*, 74 Miss. 320, 21 So. Rep. 132, 26 Ins. L. J. 995. And see *Southern Cold-Storage Co. v. Dechman*, 73 S. W. Rep. 547 (Tex. Civ. App.), and Rule 7.

RULE 7.

Property Held in Trust.

When goods or other property are described as "held in trust," the words "in trust" mean those goods with the care of which the insured is intrusted and not a trust in the technical sense enforceable in equity;¹ may cover "goods stored;"² property in possession of an agent;³ and in such cases insured may recover the whole amount of any loss, holding all beyond his own interest as trustee for his principal;⁴ the fact that a storage company is relieved by contract from responsibility for loss or damage by fire does not prevent it from insuring the property to extent of its lien.⁵

1. *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S. W. Rep. 711; *Southern Cold-Storage Co. v. Dechman*, 73 S. W. Rep. 547 (Tex. Civ. App.); *Hough v. People's Ins. Co.*, 36 Md. 398; *Lucas v. Liverpool, L. & G. Ins. Co.*, 23 W. Va. 258; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409; *Burke v. Continental Ins. Co.*, App. Div. , 91 N. Y. Supp. 402.

2. *Pittsburg Storage Co. v. Scottish U. & N. Ins. Co.*, 168 Pa. St. 522, 32 Atl. Rep. 58, 24 Ins. L. J. 781; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Home Ins. Co. v. Favorite*, 46 Ill. 263.

3. *Roberts v. Firemen's Ins. Co.*, 165 Pa. St. 55, 30 Atl. Rep. 450; *Snow v. Carr*, 61 Ala. 363.

4. *Roberts v. Firemen's Ins. Co.*, *supra*; *Johnson v. Campbell*, 120 Mass. 449; *Hough v. People's Ins. Co.*, 36 Md. 398; *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (U. S.), 527; *Robbins v. Firemen's Fund Ins. Co.*, 16 Blatchf. (U. S. Cir.) 122; *Reitenbach v. Johnson*, 129 Mass. 316; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387. And see *Stilwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; *Boyd v. McKee*, 99 Va. 72, 37 S. E. Rep. 810; *Ferguson v. Pekin Plow Co.*, *supra*; *McDonald v. Palmer*, 48 S. W. Rep. 338, *affd. orally* by Sup. Ct. Tenn. 342; *Johnston v. Charles Abresch Co.*, Wis. , 101 N. W. Rep. 395.

5. *Pittsburg Storage Co. v. Scottish U. & N. Ins. Co.*, *supra*.
As to goods stored, see "Exemptions," "Exceptions," etc., Rules 16, 17.

RULE 8.

Property under Conditional Contract of Sale.

When personal property is sold under a conditional contract of sale, title to remain in seller until price is paid, and insurance is taken out upon his interest and he pays the premium, he is entitled to all the insurance money, and the purchaser has no claim to the same;¹ if the vendee is liable for loss or damage by fire, *his* insurable interest extends to the whole value of the property and is not limited to payments.²

1. *Kortlander v. Elston*, 52 Fed. Rep. 180, 2 C. C. A. 557.

2. *Ryan v. Agricultural Ins. Co.*, Mass. , 73 N. E. Rep. 849, distinguishing *Tabbut v. American Ins. Co.*, Mass. , 70 N. E. Rep. 430.

RULE 9.

Insurance of an Estate.

When policy issues to and in name of an "estate," as "Estate of," it covers interests of heir and administrator; and, if obtained by one, may be ratified by the other even after a loss;¹ in such a case extrinsic evidence is admissible to show who were intended.²

1. *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, 55 Pac. Rep. 905. And see *Weed v. London & L. Ins. Co.*, 116 N. Y. 106, 22 N. E. Rep. 229; *Savage v. Howard Ins. Co.*, 52 N. Y. 503; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. Rep. 5.

2. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. And see *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

RULE 10.

Policy in Name of Deceased Owner — Wrong Name.

Where policy by accident, mistake, or design is written in name of a deceased owner instead of "Estate of such owner," as applied for, and the facts being known to company's agent who issued the policy, the insurance is not thereby voided; nor is it necessary to have policy reformed in equity. Claim may be maintained thereon at law, the plaintiff executor averring that policy was made to him in the name therein appearing,¹ and so when policy is issued in wrong name of assured who is known by both names;² and so where a woman is insured, and the property is described as "his,"³

1. *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. Rep. 130, affg. 63 Ill. 67.

2. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

3. *Simon v. Home Ins. Co.*, 58 Mich. 278.

RULE 11.

Name of Estate, Loss Payable to Widow.

Where policy issues to and in name of estate with loss payable to the widow as her interest may appear, her interest being that of dower, and she dies, a settlement with her executor by the insurance company, even against the protest of the owner of the reversion,

is binding upon such owner, whose remedy, if any, is against the widow's executor.

Ridge v. Home Ins. Co., 64 Mo. App. 108.

RULE 12.

Wrong Name — Reformation.

Where policy issues in wrong name, with knowledge of the company's agent as to the facts and correct name, the proper remedy is by suit for reformation.¹ The mortgagee clause operates as an independent contract notwithstanding wrong name of insured.²

1. *McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112, *affd.*, 169 N. Y. 590, without opinion. And see *Lancashire Ins. Co. v. Lucas* (Ky.), 34 S. W. Rep. 899; *Trustees St. Clara Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. Rep. 1140; *Croft v. Hanover Ins. Co.*, 40 W. Va. 508, 21 S. E. Rep. 854; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. Rep. 843. See Rule 10.

2. *Phoenix Assur. Co. v. Hinds*, 67 Kans. 595, 73 Pac. Rep. 893. See Mortgagee and Mortgagee, Rule 2.

RULE 13.

Meaning of Words "As Interest May Appear."

Where the loss is made payable to a certain party or person "as interest may appear," these words do not necessarily refer to an interest in the property insured, but extend to an interest as creditor or the like; and when the interest exceeds the amount of the insurance, such appointee to receive the loss may claim the whole without joining the insured;¹ and the interest may be established by another contract.²

1. *Donaldson v. Sun Mutual Ins. Co.*, 95 Tenn. 280, 32 S. W. Rep. 251, 25 Ins. L. J. 277; *West Coast Lumber Co. v. State Investment Ins. Co.*, 98 Cal. 502, 33 Pac. Rep. 258, 22 Ins. L. J. 681; *Brown v. Commercial Ins. Co.*, 21 App. D. C. 325.

2. *Graham v. American Ins. Co.*, 48 S. C. 195, 26 S. E. Rep. 323, 26 Ins. L. J. 744.

RULE 14.**Policy Issued to Two Persons as Interest may Appear.**

Where policy issues to two persons as interest may appear, the company has no right to determine what sum shall be paid to each, and if it pays the whole sum to either, it does so at its peril. Under such circumstances both are necessary parties to a release or to an action to recover on the policy unless it appear that the interest of one has been extinguished.

Besant v. Glens Falls Ins. Co., 72 App. Div. 276, 76 N. Y. Supp. 35. And see *Kent v. Ætna Ins. Co.*, 84 App. Div. 428, 82 N. Y. Supp. 817; *Davis v. New England Ins. Co.*, 70 Vt. 217, 39 Atl. Rep. 1095.

RULE 15.**Burden of Proof as to Interest.**

Where loss is made payable to a third party as "his interest may appear," the burden rests upon such party of establishing his interest.

Wilcox v. Mutual Ins. Co., 81 Minn. 478, 84 N. W. Rep. 334.

RULE 16.**Distinction Between Insurance of Interest as it may Appear and Making Loss Payable as may Appear.**

There is distinction between insuring certain named persons as assured "as interest may appear" and insurance of owner with loss payable to third party as interest may appear.

De Wolf v. Capital City Ins. Co., 16 Hun, 116; *Dakin v. Liverpool, L. & G. Ins. Co.*, 77 N. Y. 600. And see Rule 14.

RULE 17.**Effect of Making Loss Payable to a Third Party.**

Insertion of a clause making the loss, if any, payable to a mortgagee or other third party, merely makes

such third party an appointee to receive the loss; the relation of the parties is not thereby changed; and if the policy is forfeited by the insured, such appointee ceases to have any interest or claim to the insurance;¹ where loss is made payable to third party without limitation to his interest as it may appear, he may claim and receive the whole loss due under the policy, holding the excess over his own interest as a trustee for benefit of the owner.²

1. *Home Ins. Co. v. Hauslein*, 60 Ill. 521; *Wunderlick v. Palatine Ins. Co.*, 104 Wis. 395, 80 N. W. Rep. 471; *Van Alstyne v. Aetna Ins. Co.*, 14 Hun, 360; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Van Buren v. St. Joseph Ins. Co.*, 28 Mich. 398; *Griswold v. American Central Ins. Co.*, 70 Mo. 654; *State Ins. Co. v. Maackens*, 9 Vroom (N. J.), 564; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. Rep. 772; *Merwin v. Star Ins. Co.*, 7 Hun, 659, affd. without opinion, 72 N. Y. 603; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 98, 104; *Brunswick Savings Inst. v. Commercial Union Assur. Co.*, 68 Me. 313; *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. (U. S. Cir.) 504; *Martin v. Franklin Ins. Co.*, 9 Vroom (N. J.), 140; *Warbasse v. Sussex Ins. Co.*, 13 Vroom (N. J.), 203; *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28; *Perry v. Lorillard Ins. Co.*, 61 N. Y. 214; *Frink v. Hampden Ins. Co.*, 45 Barb. 384; *Heyl v. Aetna Ins. Co.*, Ala., 38 So. Rep. 118.

2. *Dakin v. Liv., L. & G. Ins. Co.*, 77 N. Y. 600, affg. 13 Hun, 122; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619. The right of a party to whom loss is payable to maintain an action jointly with the insured or separately, or making him a party, is governed by local Codes, statutes or rules of practice; whether maintainable by real party or parties in interest or only the contractual party to use of others interested or otherwise governing the parties to an action. To exhaust this subject would be to extend the book beyond its reasonable scope and plan. The cases are collected and reviewed in *Brown v. Commercial Ins. Co.*, 21 App. D. C. 325. And see *Brannigan v. Jefferson Ins. Co.*, 102 Mo. App. 70, 76 S. W. Rep. 643; *Anthony v. German Am. Ins. Co.*, 48 Mo. App. 65; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 98 (N. Y.); *Frink v. Hampden Ins. Co.*, 31 How. 30, 1 Abb. N. S. 343 (N. Y.); *Solms v. Rutgers Ins. Co.*, 3 Keyes, 416, 4 Abb. Ct. App. 279 (N. Y.); *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Martin v. Franklin Ins. Co.*, 9 Vroom, 140; *McQueen v. Phoenix Ins. Co.*, 4 Duval, 660 (Can. Sup.); *Coates v. Penn. Ins. Co.*, 58 Md. 172; *Chamberlain v. Ins. Co.*, 55 N. H. 249; *Hadley v. Ins. Co.*, 55 N. H. 110; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; *Westchester Ins. Co. v. Foster*, 90 Ill. 121; *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598; *Turner v. Quincy Ins. Co.*, 109 Mass. 568; *Thatch v. Metropole Ins. Co.*, 11 Fed. Rep. 29; *Lane v. Sun Ins. Co.*, 35 La. Ann. 224.

And see *Mortgagor and Mortgagee*, Rules 10 and 13.

RULE 18.**Policy Assignable After Fire.**

After a fire, policy is assignable like any other chose in action;¹ the assignment need not be in writing; anything showing an intent to assign on one side and intent to receive on the other;² an order addressed to the insurance company to pay a part of the loss may operate as an equitable assignment or be evidence of it.³

1. *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835, 24 Ins. L. J. 154.

2. *Bentley v. Standard Ins. Co.*, 40 W. Va. 729, 23 S. E. Rep. 584; *Western Assur. Co. v. McCarthy*, 18 Ind. App. 449, 48 N. E. Rep. 265, 27 Ins. L. J. 187.

3. *Collins & A. Co. v. United States Ins. Co.*, 7 Tex. Civ. App. 579, 27 S. W. Rep. 147.

TITLE II.**Legal Representatives.**

- RULE 1.** Legal representatives included in "insured" by contract.
2. Who included by legal representatives.
 3. Ordinary meaning of legal representatives — But not so confined — Receiver.
 4. Effect of death of insured — Right to maintain action.

RULE 1.**Legal Representatives Included in "Insured" by Contract.**

Wherever in the policy the word "insured" occurs, it includes the legal representatives of the insured.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
South Dakota,
Wisconsin.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

The standard form of policy prescribed in :

Maine,
Massachusetts,

Minnesota,

in terms insures "——— and "——— legal representatives."

The New Hampshire form contains no reference to legal representatives.

The South Dakota form adds the words "and assigns" to Massachusetts form as above, and it also contains the language in Rule 1.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

The rule as above stated would seem to be the legal rule in event of death of the insured, independent of any such provision in the policy.

Lawrence v. Niagara Ins. Co., 2 App. Div. 267, 37 N. Y. Supp. 811, *affd.*, on opinion below, 154 N. Y. 752.

Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88; *Westchester Ins. Co. v. Dodge*, 44 Mich. 420.

RULE 2.

Who Included by Legal Representatives.

Legal representatives include all persons, natural or artificial, who by operation of law stand in the place of and represent the interests of the assured;¹ but does not include agents.²

1. *Alford v. Consolidated Ins. Co.*, 88 Minn. 478, 93 N. W. Rep. 517.

2. *Metzger v. Manchester Fire Assur. Co.*, 102 Mich. 334, 63 N. W. Rep. 650.

RULE 3.

Ordinary Meaning of Legal Representatives — But not so Confined — Receiver.

Legal representatives ordinarily means the equivalent of executor or administrator, but may in absence of either include heirs, next of kin, legatees, devisees, or assignee;¹ or receiver of an insolvent corporation.²

1. *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 48 N. E. Rep. 751, *affg.* 9 App. Div. 339, 41 N. Y. Supp. 304;

German Ins. Co. v. Wright, 6 Kans. App. 611, 49 Pac. Rep. 704; *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. Rep. 743.

2. *Alford v. Consolidated Ins. Co.*, 88 Minn. 478, 93 N. W. Rep. 517.

RULE 4.

Effect of Death of Insured — Right to Maintain Action.

Upon death of the insured the right to claim and recover the insurance on both real and personal property vests in his administrator or executor, as "legal representative;" as to personal property the claim exists in his own right, and as to the real estate he may be regarded as the trustee of an express trust, collecting or suing therefor for benefit of the heirs, or others interested therein; and both rights may be enforced at same time or in same action.

Lawrence v. Niagara Ins. Co., 2 App. Div. 267, 37 N. Y. Supp. 811, *affd.* on opinion below, 154 N. Y. 752; *Culbertson v. Cox*, 29 Minn. 309, 11 Ins. L. J. 817. And see *Lappin v. Charter Oak Ins. Co.*, 58 Barb. 325; *Wyman v. Wyman*, 26 N. Y. 253; *Germania Ins. Co. v. Curran*, 8 Kans. 9; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39; *Baldwin v. Pennsylvania Ins. Co.*, 206 Pa. St. 248, 55 Atl. Rep. 970.

While payment may be voluntarily made to a foreign administrator or executor deriving his authority from administration granted in another State (*Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 129), he cannot ordinarily as such maintain a suit or action in absence of some specific statutory authority, or ancillary letters of administration. And see *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306.

TITLE III.**Mortgagor and Mortgagee.**

- RULE** 1. Interest of mortgagee or other third party as affected by contract.
2. Effect of the mortgagee clause.
 3. Effect of neglect or wrongdoing by mortgagee.
 4. Scope and application of the words "act or neglect" in mortgagee clause.
 5. Limitation upon effect of mortgagee clause.
 6. Effect of assignment by mortgagee.
 7. Effect of payment of actual loss to mortgagee.
 8. Effect of settlement with owner and mortgagor on void policy.
 9. Effect of insurance of interest of mortgagee.
 10. Effect of making loss payable to mortgagee without the mortgagee clause.
 11. Settlement or adjustment as affecting mortgagee — Appraisal.
 12. Settlement or adjustment with mortgagee.
 13. Claim of mortgagee to whom loss made payable.
 14. Company may interplead.
 15. Effect of repairs by owner.
 16. Lien of mortgagee upon insurance.
 17. Mortgagee may claim waiver.
 18. Provision requiring notice of change of title — Foreclosure.
 19. Right to assignment of mortgage must be exercised within reasonable time.
 20. Special rule of construction in some of the States.

RULE 1.**Interest of Mortgagee or Other Third Party as Affected by Contract.**

If with the consent of the company, an interest under the policy shall exist in favor of a mortgagee or of any person or corporation, having an interest in the subject of insurance, other than the interest of the insured as described therein, the conditions "hereinbefore" contained (i. e. in the policy) shall apply in the manner

expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended to the policy.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in:

Maine,
Massachusetts,

Minnesota,
New Hampshire,

in terms prescribes as follows:

"If the policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever the company shall be liable to a mortgagee for any sum for loss under the policy, for which no liability exists as to the mortgagor or owner, and the company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

The South Dakota form provides: "If this policy shall be made payable to a mortgagee or trustee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's or trustee's rights to recover in case of loss on such real estate. Provided, that such mortgagee or trustee shall, on demand, pay according to the customary scale of rates for any increase of risk not paid for by the insured. And in case this policy shall have been issued to the owner of the insured property with the loss payable to a mortgagee, and the owner shall have done any act voiding the policy as herein provided or the policy shall have been canceled so that the company is not liable to him in any event, then the mortgagee, upon payment to him of the full amount secured by such mortgage, shall assign to the company or companies making such payment the mortgage, together with the note or debt secured thereby."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

RULE 2.

Effect of the Mortgage Clause.

Where insurance is obtained by owner and a mortgagor, and in addition to making the loss payable to the mortgagee, there is inserted or added what is called the "*mortgagee clause*," it operates as a distinct, separate, and independent insurance contract as between the mortgagee and the company, in protection of the mortgagee's interest;¹ not necessarily and wholly independent insurance of that interest, yet separate and distinct in protection of it.²

1. *Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co.*, 17 Wash. 175, 49 Pac. Rep. 231, 27 Ins. L. J. 144; *Planters' Ins. Assoc. v. Southern Savings Co.*, 68 Ark. 8, 56 S. W. Rep. 443; *Lancashire Ins. Co. v. Boardman*, 58 Kans. 339, 49 Pac. Rep. 92, 27 Ins. L. J. 470; *Westchester Ins. Co. v. Coverdale*, 48 Kans. 446, 29 Pac. Rep. 682; *Ormsby v. Phoenix Ins. Co.*, 5 S. D. 72, 24 Ins. L. J. 110; *Hanover Ins. Co. v. Bohn*, 48 Nebr. 743, 67 N. W. Rep. 774, 25 Ins. L. J. 681; *Insurance Co. of N. A. v. International Trust Co.*, 71 Fed. Rep. 88, 36 U. S. App. 291, 17 C. C. A. 616; *Palmer Savings Bank v. Insurance Co. of N. A.*, 166 Mass. 189, 44 N. E. Rep. 211, 25 Ins. L. J. 739; *Whiting v. Burkhardt*, 178 Mass. 535, 60 N. E. Rep. 1; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; *Meriden Savings Bank v. Home Mutual Ins. Co.*, 50 Conn. 396, 12 Ins. L. J. 620; *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568, 33 So. Rep. 473; *Scottish Union & National Ins. Co. v. Field*, 18 Colo. 68, 70 Pac. Rep. 149; *Breeyear v. Rockingham Ins. Co.*, 71 N. H. 445, 52 Atl. Rep. 860; *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. Rep. 5; *Smith v. Union Ins. Co.*, 25 R. I. 260, 55 Atl. Rep. 715; *Phoenix Assur. Co. v. Hinds*, 67 Kans. 595, 73 Pac. Rep. 893; *Collinsville Savings Soc. v. Boston Ins. Co.*, Conn., 60 Atl. Rep. 647.

2. *Glens Falls Ins. Co. v. Porter*, *supra*; *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. Rep. 445. And see Rule 5 and "Subrogation."

For a form of mortgagee clause, see chapter twelfth.

RULE 3.

Effect of Neglect or Wrongdoing by Mortgagee.

The mortgagee clause protects the mortgagee against the acts or neglect of the owner and mortgagor, but not against his own neglect or wrongdoing.¹ As to whether the stipulation in the mortgagee clause such

as giving notice of change in title, or increase of risk, etc., operate as *conditions*, violation of which produces a forfeiture of the insurance as to the mortgagee,² or as covenants,³ the courts do not agree.

1. American Central Ins. Co. v. Cowan (Tex.), 34 S. W. Rep. 460; Genesee Falls Saving Assoc. v. U. S. Ins. Co., 16 App. Div. 587, 44 N. Y. Supp. 979; Mills National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. Rep. 509.

2. Ormsby v. Phoenix Ins. Co., 5 S. D. 72, 24 Ins. L. J. 110; Continental Ins. Co. v. Anderson, 107 Ga. 541, 33 S. E. Rep. 887, 28 Ins. L. J. 938; Cole v. Germania Ins. Co., 99 N. Y. 36, 14 Ins. L. J. 453.

3. Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co., 17 Wash. 175, 49 Pac. Rep. 231, 27 Ins. L. J. 144; Phoenix Ins. Co. v. Omaha Loan & Trust Co., 41 Nebr. 834, 60 N. W. Rep. 133, 24 Ins. L. J. 189.

RULE 4.

Scope and Application of the Words "Act or Neglect" in Mortgage Clause.

The "act or neglect" of the owner and mortgagor, stipulated usually in the mortgagee clause as not invalidating the policy as to the mortgagee, contemplates a case where the owner *could* act or *could* neglect, and not a case where policy was issued in name of an infant child three years old upon a misrepresentation as to the title.

Graham v. Fireman's Ins. Co., 87 N. Y. 69, 78.

RULE 5.

Limitation upon Effect of Mortgagee Clause.

While the "mortgagee clause" operates as an independent contract, the policy nevertheless exists and continues in the interest of the insured and mort-

gagor and owner, unless forfeited, or is void as to him; it is only when the policy is *voided* as to the insured or mortgagor or owner, that he loses the benefit of the insurance in reduction or payment of the mortgage, and the insurance company acquires any right to foreclose or enforce same through subrogation or assignment;¹ but rule is otherwise where, independently of the owner and mortgagor, the mortgagee obtains the insurance in his own name and upon his own interest.²

1. *Insurance Co. of N. A. v. Martin*, 151 Ind. 209, 51 N. E. Rep. 361; *Sterling Ins. Co. v. Beffrey*, 48 Minn. 9, 50 N. W. Rep. 922, 21 Ins. L. J. 274; *Eddy v. London Assur. Co.*, 65 Hun, 307, 20 N. Y. Supp. 216, *affd.*, 143 N. Y. 311, 38 N. E. Rep. 307; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161. And see *Doran v. Franklin Ins. Co.*, 10 Ins. L. J. 842, 86 N. Y. 635, memo. not fully reported; *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 428; *Badger v. Platts*, 68 N. H. 222, 44 Atl. Rep. 296; *Concord Mutual Ins. Co. v. Woodbury*, 45 Me. 447; *Waring v. Loder*, 53 N. Y. 581; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; *Allen v. Watertown Ins. Co.*, 132 Mass. 480; *Gardner v. Continental Ins. Co.*, 75 S. W. Rep. 283 (Ky.).

2. *Foster v. Van Reed*, 70 N. Y. 19; *Dick v. Franklin Ins. Co.*, 81 Mo. 103, 10 Ins. L. J. 468; *Burlingame v. Goodspeed*, 153 Mass. 24, 20 Ins. L. J. 283; *Concord Ins. Co. v. Woodbury*, 45 Me. 447. And see *Dunbrack v. Neall*, W. Va. , 47 S. E. Rep. 303. And see "Subrogation."

RULE 6.

Effect of Assignment by Mortgagee.

A suit cannot be maintained and damages recovered from an insurance company by reason of partial destruction of the mortgaged premises, where at the time of the fire the policy had become void as against the owners of the property insured, and the mortgagee to whom the loss was made payable, with mortgagee clause attached, had assigned his mortgage to a third party before the fire, but failed to transfer to him his

interest as mortgagee in the policy of insurance and to obtain consent of the company. The policy of insurance is a contract of indemnity personal to the party to whom it is issued, or for whose interest the company undertakes to be responsible in case of loss, and cannot be transferred to a third person to be valid in his hands without the company's consent.

Kase v. Hartford Ins. Co., 58 N. J. L. 34, 25 Ins. L. J. 158, 32 Atl. Rep. 1057. And see "Parties to the Fire Insurance Contract," Rule 1.

RULE 7.

Effect of Payment of Actual Loss to Mortgagee.

Where the mortgagee to whom loss is payable by several insurance policies, with mortgagee clause attached to each, has received the whole amount of the actual loss or damage from some of the insurance companies, the assured cannot sustain an action against the others.

Norwich Union Ins. Soc. v. Wellhouse, 113 Ga. 970, 39 S. E. Rep. 397.

RULE 8.

Effect of Settlement with Owner and Mortgagor on Void Policy.

If a policy is claimed to be void, but the insurance company, notwithstanding, pays the assured owner or mortgagor a substantial amount in settlement, in addition to an amount paid a mortgagee for an assignment of the mortgage, both being within the amount of the policy or insurance, there being some evidence of intention to include in the settlement the value of the mortgage, the insurance company takes nothing

by the assignment, and may be required to release the mortgage;¹ unless settlement is in terms without prejudice.²

1. *Prinz v. Citizens' Ins. Co.*, 80 App. Div. 638, 81 N. Y. Supp. 141.

2. *Wisconsin Loan Assoc. v. Webster*, 119 Wis. 476, 97 N. W. Rep. 171.

RULE 9.

Effect of Insurance of Interest of Mortgagee.

Where insurance is upon the interest of the mortgagee exclusively, such interest extends to the whole property as at date of the policy. It is not an insurance of the debt, and if property is consumed in part or damaged by fire, the mortgagee's interest is to that extent affected and the insurance company is bound to make good the loss without regard to value of property remaining.

Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343;
De Wolf v. Capital City Ins. Co., 16 Hun, 116.

RULE 10.

Effect of Making Loss Payable to Mortgagee Without the Mortgagee Clause.

Where policy is issued to the owner, with loss, if any, payable to a mortgagee as interest may appear, but without the "mortgagee clause" attached, the contract of insurance is with the owner exclusively, the mortgagee being merely an appointee to receive the amount of the owner's loss; if policy is forfeited as to the owner, the mortgagee cannot recover;¹ and policy cannot be revived for benefit of the mortgagee, by attaching a mortgagee clause, unless there be a new consideration for it.²

1. *Moore v. Hanover Ins. Co.*, 141 N. Y. 219, 36 N. E. Rep. 191, 23 Ins. L. J. 466, revg. 71 Hun, 199, 24 N. Y. Supp. 507;

Cone v. Niagara Ins. Co., 60 N. Y. 619; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 556, 54 N. E. Rep. 772 (reasoning and construction of the cases cited under Rule 20 disapproved); *Delaware Ins. Co. v. Greer*, 120 Fed. Rep. 916 (C. C. A.); *Monroe Building & L. Assoc. v. Liv., L. & G. Ins. Co.*, 50 La. Ann. 1243, 24 So. Rep. 238, 28 Ins. L. J. 266; *Holbrook v. Baloise Ins. Co.*, 117 Cal. 561, 49 Pac. Rep. 555; *Reynolds v. London & Lancashire Ins. Co.*, 128 Cal. 16, 60 Pac. Rep. 467; *Scania v. Johnson*, 22 Colo. 476, 45 Pac. Rep. 431; *Sun Ins. Co. v. Greenville Building & Loan Association*, 58 N. J. L. 367, 33 Atl. Rep. 962, 25 Ins. L. J. 657; *Hocking v. Virginia F. & M. Ins. Co.*, 99 Tenn. 729, 42 S. W. Rep. 451; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. Rep. 429, 30 L. R. A. 633, 25 Ins. L. J. 339; *Williamson v. Michigan Ins. Co.*, 86 Wis. 393, 57 N. W. Rep. 46, 23 Ins. L. J. 311; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295; *Richmond v. Phoenix Ins. Co.*, 88 Me. 105, 33 Atl. Rep. 786, 25 Ins. L. J. 354; *Cloud County Bank v. German Ins. Co.*, 6 Kans. App. 219, 49 Pac. Rep. 688; *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Antes v. State Ins. Co.*, 61 Nebr. 55, 84 N. W. Rep. 412; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Franklin Savings Institution v. Central Ins. Co.*, 119 Mass. 240; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Rosenstein v. Traders' Ins. Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736; *Jaskulski v. Citizens' Ins. Co.*, 131 Mich. 603, 92 N. W. Rep. 98; *Breeyear v. Rockingham Ins. Co.*, 71 N. H. 445, 52 Atl. Rep. 860; *Lewis v. Guardian Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525, *affd.*, 181 N. Y. 392, ; *Hamburg-Bremen Ins. Co. v. Ruddell*, Tex. Civ. App. , 82 S. W. Rep. 826; *Collinsville Savings Soc. v. Boston Ins. Co.*, Conn. , 60 Atl. Rep. 647.

2. *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. Rep. 326, 27 Ins. L. J. 794. And see Rule 20.

RULE 11.

Settlement or Adjustment as Affecting Mortgage — Appraisal.

An owner of the property and the company cannot, without the concurrence of the mortgagee to whom the loss was made payable as interest may appear, effect a settlement or accord and satisfaction without the assent of the latter,¹ or bind the mortgagee in appraisal or arbitration;² and when there is a mort-

gagee clause in the policy, the mortgagee is not bound by an adjustment of amount with owner.³ A mortgagee is bound by adjustment or appraisal with the insured, when there is no mortgagee clause.⁴

1. *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 32 N. E. Rep. 40, 22 Ins. L. J. 358; *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126; *Hall v. Fire Assoc.*, 64 N. H. 405, 13 Atl. Rep. 648.

2. *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Bergman v. Commercial Union Assur. Co.*, 92 Ky. 494, 18 S. W. Rep. 122, 15 L. R. A. 270, 21 Ins. L. J. 271. And see *Iowa Central Building Assoc. v. Merchants' Ins. Co.*, 120 Iowa, 530, 94 N. W. Rep. 1100.

3. *Scottish Union & Nat. Ins. Co. v. Field*, 16 Colo. 349, 70 Pac. Rep. 149.

4. *Collinsville Savings Soc. v. Boston Ins. Co.*, Conn. , 60 Atl. Rep. 647.

RULE 12.

Settlement or Adjustment with Mortgagee.

Where the insurance is in the name of the mortgagee, and upon his interest as such, there is no breach of trust or obligation in his settling with the insurance company for amount of his interest;¹ and same principle or rule applies when policy is issued to and in name of owner, with loss payable to the mortgagee, with "*mortgagee clause*" attached, and the policy is void as to the owner.²

1. *McDowall v. Morath*, 64 Mo. App. 290.

2. See Rules 5 and 11.

RULE 13.

Claim of Mortgagee to Whom Loss Made Payable.

Where loss is made payable to a mortgagee, it is an absolute appointment for payment of the whole loss. In such a case the mortgagee can claim, receive, or recover the whole loss, holding the balance, if any, in excess of his own interest, as trustee for the owner. But when it is made payable "as interest may ap-

pear," then both the mortgagee and owner are proper parties to receive or recover the loss;¹ if the amount of the mortgage debt or such interest exceeds the whole amount of the insurance, the mortgagee may maintain claim alone;² although it remains proper to make the owner and insured a party to answer as to his interest.³ Interest of a mortgagee ceases with discharge of the mortgage.⁴ But his right to claim the insurance does not depend upon mortgage debt being due.⁵ He may execute a waiver or disclaimer of claim to the insurance.⁶

1. *Ermentraut v. American Ins. Co.*, 60 Minn. 418, 62 N. W. Rep. 543; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. Rep. 383. 25 Ins. L. J. 610; *Proctor v. Georgia Home Ins. Co.*, 124 N. C. 265, 32 S. E. Rep. 716; *Powers v. New England Ins. Co.*, 69 Vt. 494, 38 Atl. Rep. 148; *Carberry v. German Ins. Co.*, 86 Wis. 323, 56 N. W. Rep. 920. 23 Ins. L. J. 137; *Palmer Sav. Bank v. Insurance Co. of N. A.*, 166 Mass. 189, 44 N. E. Rep. 211, 25 Ins. L. J. 739, 32 L. R. A. 615; *Smith v. Packard*, 19 N. H. 575; *Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, 17 S. E. Rep. 303; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Winne v. Niagara Ins. Co.*, 91 N. Y. 185; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Scottish Union & Nat. Ins. Co. v. Enslie*, 78 Miss. 157, 28 So. Rep. 822; *Lewis v. Guardian Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525, *affd.*, 181 N. Y. 392, 74 N. E. Rep. 224; *Farmers' Bank v. Manchester Assur. Co.*, Mo. App. , 80 S. W. Rep. 299; *Staats v. Georgia Home Ins. Co.*, W. Va. , 50 S. E. Rep. 815.

2. *Lowry v. Insurance Co. of N. A.*, 75 Miss. 43, 21 So. Rep. 664, 26 Ins. L. J. 618; *Capital City Ins. Co. v. Jones*, 128 Ala. 361, 30 So. Rep. 674; *Peck v. Girard F. & M. Ins. Co.*, 16 Utah, 121, 51 Pac. Rep. 255; *Hammel v. Queens Ins. Co.*, 50 Wis. 240; *Northwestern Mut. Life Ins. Co. v. Germania Ins. Co.*, 40 Wis. 446; *Panhandle Nat. Bank v. Security Co.*, 18 Tex. Civ. App. 96, 44 S. W. Rep. 936; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *Baltis v. Dobin*, 67 Barb. 507; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. Rep. 772; *Trust Co. v. Scottish Union & Nat. Ins. Co.*, 119 Ga. 672, 46 S. E. Rep. 855; *Ritchie Co. Bank v. Firemen's Ins. Co.*, W. Va. , 47 S. E. Rep. 94. See also "Parties to Contract," Rule 17.

3. *Franklin Ins. Co. v. Wolff*.

4. *Reynolds v. London & Lancashire Ins. Co.*, 128 Cal. 16, 60 Pac. Rep. 467.

5. *Planters' Ins. Assoc. v. Southern Savings Co.*, 68 Ark. 8, 56 S. W. Rep. 443.

6. *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. Rep. 16. 23 Ins. L. J. 580. It was held in *Uhfelder v. Palatine Ins. Co.*, 44 Misc. 153, 89 N. Y. Supp. 792, that the interest of a mortgagee ceased with the purchase by him on sale in foreclosure and for fire occurring after such sale there was no damage to his interest.

RULE 14.

Company May Interplead.

Where there is a dispute between the owner and assured, and a mortgagee to whom loss is payable as interest may appear, and payment to latter would involve risk or hazard, the insurance company should be permitted to deposit the money in court by interpleader.

Sexton v. Home Ins. Co., 35 App. Div. 170, 54 N. Y. Supp. 862; *Fanning v. Equitable Ins. Co.*, 46 Ill. App. 215.

RULE 15.

Effect of Repairs by Owner.

If policy insures owner and mortgagor and damaged property is repaired by him, no right of action remains in a mortgagee to whom the loss, if any, is made payable;¹ but may be otherwise when the policy or insurance is upon the interest of the mortgagee.²

1. *Friemansdorf v. Watertown Ins. Co.*, 1 Fed. Rep. 68. And see *Matter of Moore*, 6 Daly, 541; *Huey v. Ewell*, 22 Tex. Civ. App. 638, 55 S. W. Rep. 606.

2. *Ætna Ins. Co. v. Baker*, 71 Ind. 102. And see *Kernochan v. New York Bowery Ins. Co.*, 5 Duer, 1; and on a subsequent appeal, 17 N. Y. 428; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Foster v. Equitable Ins. Co.*, 68 Mass. 216.

RULE 16.

Lien of Mortgagee upon Insurance.

Where the mortgagor is bound by covenant or otherwise by executory agreement to keep property insured for benefit of the mortgagee, the latter has an equitable *lien* upon the insurance obtained by the mortgagor

even if taken out in his name and not made payable to the mortgagee;¹ but where the mortgagor obtained insurance not only upon the building, but also upon *personal* property, there should be some evidence that the insurance was obtained in discharge of the obligation to keep insured to sustain a lien.² When the insurance company has notice of such a claim or lien, it should act very cautiously and carefully as it acts at its peril.³ A mortgagee is not entitled to benefit of insurance obtained by the mortgagor, unless there is a contract or agreement to that effect.⁴

1. *Swearingen v. Hartford Ins. Co.*, 52 S. C. 309, 29 S. E. Rep. 722; subsequent appeal, 56 S. C. 355, 34 S. E. Rep. 449; *Chipman v. Carroll*, 53 Kans. 163, 35 Pac. Rep. 1109; *Ætna Ins. Co. v. Thompson*, 68 N. H. 20, 40 Atl. Rep. 396; *Wheeler v. Factors & Traders' Ins. Co.*, 101 U. S. 439; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N. E. Rep. 683; *Wattengel v. Schultz*, 11 Misc. 165, 32 N. Y. Supp. 91; *Hathaway v. Orient Ins. Co.*, 58 Hun, 602, 11 N. Y. Supp. 413; *Heins v. Wicke*, 102 Iowa, 396, 71 N. W. Rep. 345; *Nichols v. Baxter*, 5 R. I. 491; *Ames v. Richardson*, 29 Minn. 330. And see *Farmers' Loan Co. v. Penn Plate Glass Co.*, 103 Fed. Rep. 132, 43 C. C. A. 114; *Dunlop v. Avery*, 89 N. Y. 592; *American Ice Co. v. Eastern Trust Co.*, 188 U. S. 626, 23 Sup. Ct. Rep. 432, affg. 17 App. D. C. 422; *Hyde v. Hartford Ins. Co.*, Nebr. , 97 N. W. Rep. 629.

2. *Stearns v. Quincy Ins. Co.*, 124 Mass. 61.

3. *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 16 Ins. L. J. 129; *Wilson v. Hakes*, 36 Ill. App. 539. And see Rule 14.

4. *Guill's Admr. v. Corinth Bank (Ky.)*, 68 S. W. Rep. 870.

RULE 17.

Mortgagee May Claim Waiver.

A mortgagee to whom loss is payable may claim waiver of a forfeiture, where the company requires of

him additional proofs, putting him to trouble and expense.

Granger v. Manchester Assur. Co., 119 Mich. 177, 77 N. W. Rep. 693, 28 Ins. L. J. 220. And see "Waiver."

RULE 18.

Provision Requiring Notice of Change of Title — Foreclosure.

The provision in a "mortgagee clause" requiring notice of a change of title which should come to the mortgagee's knowledge, has reference to a change or transfer of title to a third person, and not from the mortgagor and owner to the mortgagee through foreclosure;¹ under the "mortgagee clause" the mortgagee, to whom the loss is made payable, may institute foreclosure proceedings and sell the insured property without affecting *his* right to the insurance.²

1. *Pioneer Sav. & L. Co. v. St. Paul F. & M. Ins. Co.*, 68 Minn. 170, 70 N. W. Rep. 979, 26 Ins. L. J. 826.

2. *Eddy v. London Assur. Co.*, 143 N. Y. 311, 38 N. E. Rep. 307, 24 Ins. L. J. 1; *Washburn Mill Co. v. Fire Assoc.*, 60 Minn. 68, 61 N. W. Rep. 828, 24 Ins. L. J. 292. And see *Sharp v. Scottish Union & Nat. Ins. Co.*, 136 Cal. 542, 69 Pac. Rep. 253. And see Rule 20.

RULE 19.

Right to Assignment of Mortgage Must be Exercised Within Reasonable Time.

Under the "mortgagee clause" the right, if any, to pay the full amount of the mortgage, and to receive an assignment, etc., must be exercised by the insurance company within a reasonable time.

Eliot Sav. Bank v. Commercial Union Ins. Co., 142 Mass. 142, 15 Ins. L. J. 777.

RULE 20.

Special Rule of Construction in Some of the States.

In the West and South there is a tendency to make such strict construction of the language in the New York and other standard forms, relating to the interest of mortgagee, etc. (see same Rule 1), that where the loss is payable to a mortgagee to extent of his interest, it is *held* that this is in legal effect the creation of an interest under the policy with consent of the company, but that the mortgagee is bound by such conditions *only* in the standard form of policy as are specially "written upon, attached, or appended thereto."

Oakland Home Ins. Co. *v.* Bank of Commerce, 47 Nebr. 717, 66 N. W. Rep. 646; Henton *v.* Farmers' Ins. Co., Nebr. , 95 N. W. Rep. 670; East *v.* New Orleans Ins. Assoc., 76 Miss. 697, 26 So. Rep. 691; Queen Ins. Co. *v.* Dearborn Sav. Loan Assoc., 175 Ill. 115, 51 N. E. Rep. 717; Northern Assur. Co. *v.* Chicago B. & L. Assoc., 98 Ill. App. 152, *affd.*, 198 Ill. 474; Crawford *v.* Aachen & M. Ins. Co., 100 Ill. App. 454; Boyd *v.* Thuringia Ins. Co., 25 Wash. 447, 65 Pac. Rep. 785 (there is an able dissenting opinion in this case); Christensen *v.* Fidelity Ins. Co., 117 Iowa, 77, 90 N. W. Rep. 495; Senor and Muntz *v.* Western Millers' Ins. Co., 181 Mo. 104, 79 S. W. Rep. 687. See Rule 10.

It has been held in Texas that if a policy is made payable to a mortgagee as interest may appear, such interest cannot be affected by a change in the policy making payable to another party without his consent. Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. Rep. 22.

But the controversy in this case was between the mortgagee and such third party after payment or deposit of the insurance money by the insurance company. And see case below, 18 Tex. Civ. App. 96, 44 S. W. Rep. 936.

TITLE IV.

Adjuster and Adjustment.

- RULE**
1. Authority of adjuster or special agent to adjust loss.
 2. Power of adjuster limited — Cannot delegate same.
 3. Apparent scope of adjuster's authority.
 4. Necessary incidents of power of adjuster.
 5. Notice of limitation upon adjuster's authority.
 6. Adjustment subject to terms of policy.
 7. Distinction between adjustment and agreement to pay amount adjusted — Authority of adjuster, how established.
 8. Effect of adjustment and performance — Fraud or misrepresentation.
 9. Effect of receipt in full.
 10. Settlement with assignee holding policy as security.
 11. When agreement to take less than due enforceable.
 12. Adjustment and promise to pay as estoppel.
 13. Effect of offer in compromise.
 14. Ignorance and misrepresentation as to law — Mistake of fact.
 15. Not essential in equity to return or tender amount received.
 16. Effect of duress.
 17. Not necessarily fraud for company to make indorsement upon policy after fire.
 18. Company may recover back money paid on misrepresentation or fraud.
 19. Adjustment of loss — Legal business — Right to follow it in any State.

RULE 1.

Authority of Adjuster or Special Agent to Adjust Loss.

The fire insurance company is generally represented in the ascertainment or adjustment of a loss, by an adjuster or a special agent, whose powers and authority are *prima facie* coextensive with the business intrusted to his care; in the absence of evidence of his actual authority or notice to the assured of limitation upon his apparent authority, the company is bound by

his acts and declarations within the apparent scope of his authority to ascertain or adjust the loss.¹

1. *First Nat. Bank v. Manchester Assur. Co.*, 64 Minn. 96, 66 N. W. Rep. 136; *First Nat. Bank v. Lancashire Ins. Co.*, 65 Minn. 462, 68 N. W. Rep. 1; *Parsons v. Knoxville Ins. Co.*, 132 Mo. 583, 31 S. W. Rep. 117; *Van Cleave v. Union Ins. Co.*, 82 Mo. App. 668; *McGuire v. Hartford Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300, *affd.* without opinion, 158 N. Y. 680; *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451, 30 So. Rep. 537; *Ramsey v. Philadelphia Underwriters' Assoc.*, 71 Mo. App. 380; *Mix v. Royal Ins. Co.*, 169 Pa. St. 639; *Farmers' Ins. Co. v. Taylor*, 73 Pa. St. 342; *Bartlett v. Firemen's Fund Ins. Co.*, 77 Iowa, 155; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Brown v. State Ins. Co.*, 74 Iowa, 428, 38 N. W. Rep. 135; *Oshkosh Gas Light Co. v. Germania Ins. Co.*, 71 Wis. 454, 37 N. W. Rep. 819; *California Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. Rep. 577; *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263, 25 N. E. Rep. 290; *Gristock v. Royal Ins. Co.*, 84 Mich. 161, 47 N. W. Rep. 549, 87 Mich. 428, 49 N. W. Rep. 634; *Millers' Nat. Ins. Co. v. Kinneard*, 136 Ill. 199, 26 N. E. Rep. 368; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. Rep. 102; *Germania Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. Rep. 921; *Sisk v. American Cent. Ins. Co.*, 95 Mo. App. 695, 69 S. W. Rep. 687; *Couch v. Home Protection Ins. Co.* (Tex. Civ. App.), 73 S. W. Rep. 1077; *Dobson v. Hartford Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456; *Frost v. North B. & M. Ins. Co.*, Vt. , 60 Atl. Rep. 803.

RULE 2.

Power of Adjuster Limited — Cannot Delegate Same.

An insurance adjuster is ordinarily a special agent of limited authority to ascertain and adjust the loss, having no power merely *as such* in absence of some evidence as to his authority to alter the contract, waive any of its *essential conditions* (i. e. those outside the apparent scope of his authority to ascertain and adjust the loss), or to make an agreement to pay notwithstanding a forfeiture;¹ his position being one of per-

sonal trust and confidence he cannot delegate his authority to subagents;² but otherwise where he is a general adjuster in charge over a large territory.³

1. *Weed v. London & L. Ins. Co.*, 116 N. Y. 106, 117, 22 N. E. Rep. 229; *Hollis v. State Ins. Co.*, 65 Iowa, 454; *Alspaugh v. British America Ins. Co.*, 121 N. C. 290, 28 S. E. Rep. 415, 27 Ins. L. J. 441; *Hartford Ins. Co. v. Smith*, 3 Colo. 422; *Gray v. Guardian Assur. Co.*, 82 Hun, 380, 31 N. Y. Supp. 237; *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich. , 98 N. W. Rep. 761.

2. *Ruthven v. American Ins. Co.*, 92 Iowa, 316, 60 N. W. Rep. 663; *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543; *Dwelling-House Ins. Co. v. Snyder*, 59 N. J. L. 18, 34 Atl. Rep. 931, *revid.*, 59 N. J. L. 544, without affecting.

3. *Swain v. Agricultural Ins. Co.*, 37 Minn. 390, 34 N. W. Rep. 738. See also "Waiver."

RULE 3.

Apparent Scope of Adjuster's Authority.

But the company is bound by his acts, declarations, and demands within the apparent scope of his authority as adjuster, in ascertaining the loss and the legal consequences which flow therefrom, although it may have been intended that his authority should be more limited;¹ a company cannot knowingly allow an adjuster to act as such, and then repudiate his authority.²

1. *Dick v. Equitable Ins. Co.*, 92 Wis. 46; *German Ins. Co. v. Gibson*, 53 Ark. 494; *First Nat. Bank v. Manchester Assur. Co.*, 64 Minn. 96; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362.

2. *Schlesinger v. Columbian Ins. Co.*, 37 App. Div. 531, 56 N. Y. Supp. 37.

RULE 4.

Necessary Incidents of Power of Adjuster.

An adjuster authorized to settle the loss and with authority to represent the company in the settlement,

has as a necessary incident the power to waive or dispense with stipulations or conditions for benefit of the company which have reference to the mode of ascertaining the liability and limiting the right of action;¹ by denial of liability he may waive the period of sixty days before loss becomes due and payable.²

1. *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263; *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

2. *Continental Ins. Co. v. Wickham*, 110 Ga. 129, 137, 35 S. E. Rep. 287. And see "Waiver."

RULE 5.

Notice of Limitation upon Adjuster's Authority.

Where the company's agent informs the assured that he is authorized to deliver a draft in his possession in settlement of a loss only on condition that he should receive a receipt in full for all claims against the company, and assured signs such receipt, and receives the draft, it operates as a limitation upon the agent's authority, and in legal effect as an acceptance of the company's proposition by the assured, precluding him from afterward claiming any balance alleged to be reserved or due.

Kern Brewing Co. v. Royal Ins. Co., 127 Mich. 39, 86 N. W. Rep. 388.

RULE 6.

Adjustment Subject to Terms of Policy.

When an adjustment is made in terms "subject to terms and conditions of the policies," the true construction is that it is subject to all the terms and conditions except such as are superseded by the fact that the loss and damage have been fixed. An adjustment

with such an agreement means simply that the company will pay the loss as fixed under the terms and conditions of the policy, if under them the plaintiff is entitled to payment;¹ and so where adjustment is made "without reference to any other terms and conditions of the insurance contract."²

1. *Whipple v. N. B. & M. Fire Ins. Co.*, 11 R. I. 139.

2. *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 So. Rep. 116.

RULE 7.

Distinction Between Adjustment and Agreement to Pay Amount as Adjusted—Authority of Adjuster, How Established.

An adjustment of the amount of the loss, and an agreement to pay the amount as adjusted are two distinct and independent things; while the latter agreement may be made by the company or an adjuster having authority and enforced as a new agreement, independent of the policy, and need not be in writing,¹ such agreement should be established by clear, positive, and convincing evidence.² The authority of an adjuster cannot be established by his own declarations, but may be by his own testimony or inferred from his acts, and recognition by the company; or proved by declarations and admissions of its officers.³ A mortgagee to whom the loss is payable may claim the benefit of a new specific agreement to pay, without having been a party to it.⁴ Surrender of a groundless claim is not sufficient consideration for a new promise to pay.⁵

1. *Stockton Combined H. & A. Works v. Glens Falls Ins. Co.*, 121 Cal. 167, 53 Pac. Rep. 565; *Grier v. Northern Assur. Co.*, 183 Pa. St. 334, 39 Atl. Rep. 10; *McGonigle v. Agricultural Ins. Co.*, 167 Pa. St. 364, 31 Atl. Rep. 626; *McCallum v. National Ins. Co.*, 84 Minn. 134, 86 N. W. Rep. 892; *Stoelke v. Hahn*, 55 Ill. App. 497; *Gerhart Realty Co. v. Northern*

Assur. Co., 86 Mo. App. 596; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Fournier v. German-American Ins. Co.*, 23 R. I. 36, 49 Atl. Rep. 98; *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *Concordia Ins. Co. v. Koretz*, 14 Colo. 386, 60 Pac. Rep. 191; *Illinois Ins. Co. v. Archdeacon*, 82 Ill. 236; *Godchaux v. Merchant Ins. Co.*, 34 La. Ann. 235; *Wagner v. Dwelling-House Ins. Co.*, 143 Pa. St. 338, 22 Atl. Rep. 885; *Home Ins. Co. v. Howard*, 111 Ind. 544, 13 N. E. Rep. 103. And see *Vining v. Franklin Ins. Co.*, 89 Mo. App. 311.

2. *Grier v. Northern Assur. Co.*, *supra*.

3. *Flannery v. State Mut. Ins. Co.*, 175 Pa. St. 387, 34 Atl. Rep. 798; *Millers' National Ins. Co. v. Kinneard*, 136 Ill. 199, 26 N. E. Rep. 368; *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. Rep. 686, 27 Ins. L. J. 510. And see *Dobson v. Hartford Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456; *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich. , 98 N. W. Rep. 761; *Parker v. Farmers' Ins. Co.*, Mass. , 74 N. E. Rep. 286.

4. *Stockton Combined H. & A. Works v. American Ins. Co.*, 121 Cal. 182, 53 Pac. Rep. 573, 27 Ins. L. J. 1001.

5. *Melcher v. Insurance Co.*, Me. , 55 Atl. Rep. 411.

RULE 8.

Effect of Adjustment and Performance — Fraud or Misrepresentation.

Adjustments and settlements between the assured and insurance company, when *fully performed*, have all the elements and properties of a contract, and, in the absence of fraud, are as incapable of rescission as any other contract; a misrepresentation of a matter of law or a matter of judgment or the expression of an opinion in reference to a matter equally open to the observation or inquiry of both parties and depending upon the construction of the policy, the terms of which are presumed to be known to the insured, does not constitute a fraud;¹ otherwise where the adjuster makes use of any misrepresentation, deception, artifice, trick, or contrivance to prevent the assured from ascertaining his rights under the policy;² or is guilty of a misrepresentation of fact.³

1. *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. Rep. 288; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Ætna Ins.*

Co. v. Reed, 33 Ohio St. 283; *Nebraska Ins. Co. v. Segard*, 29 Nebr. 354, 45 N. W. Rep. 681; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; *American Ins. Co. v. Crawford*, 7 Ill. App. 29; *Phoenix Ins. Co. v. Van Allen*, 29 Ill. App. 149; *Saville v. Aetna Ins. Co.*, 8 Mont. 419, 20 Pac. Rep. 646; *King v. Aetna Ins. Co.*, 36 Mo. App. 128; *Rome Grocery Co. v. Greenwich Ins. Co.*, 110 Ga. 618; *Ordway v. Continental Ins. Co.*, 35 Mo. App. 426; *McLean v. American Ins. Co.*, Iowa, , 98 N. W. Rep. 227; *German Ins. Co. v. Seibert*, 24 Ind. App. 279, 56 N. E. Rep. 686. And see "Construction."

2. *Howard v. Georgia Home Ins. Co.*, 102 Ga. 137, 29 S. E. Rep. 143; *Davis v. Phoenix Ins. Co.*, 81 Mo. App. 264; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254.

3. *Burnham v. Lamar Ins. Co.*, 79 Ill. 160.

RULE 9.

Effect of Receipt in Full.

A receipt in full of all demands, including statement that policy is surrendered and canceled, is not conclusive upon the assured, who may subsequently show by parol evidence that a part of his claim was not intended to be thereby covered and included, otherwise where the receipt embodies a contract.

Fire Ins. Assoc. v. Wickham, 141 U. S. 564. And see *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354.

RULE 10.

Settlement With Assignee Holding Policy as Security.

When policy is assigned or held by an assignee as collateral security for debt of the assured, a settlement with such assignee does not preclude the assured from claiming balance due under the policy from the insurance company.

Clark v. German Ins. Co., 84 Mo. App. 243.

RULE 11.

When Agreement to Take Less Than Due Enforceable.

An agreement to take less than the ascertained amount of liability is not enforceable unless additional security is given, or there is some new consideration.

American Central Ins. Co. v. Sweetser, 116 Ind. 370.

RULE 12.

Adjustment and Promise to Pay as Estoppel.

Where the assured acts upon an adjustment and the adjuster's promise to pay, in settling with other companies upon the basis of the adjustment, it operates as an estoppel preventing the company from denying liability.

Fishbeck v. Phoenix Ins. Co., 54 Cal. 422.

RULE 13.

Effect of Offer in Compromise.

An offer to compromise by an agent or adjuster of the insurance company is not binding as an admission of liability or estoppel,¹ but may be evidence of waiver of time in furnishing of proofs.² It is always advisable to state that such offer is made without prejudice.

1. *Hanover Ins. Co. v. Stoddart*, 52 Nebr. 745, 73 N. W. Rep. 291; *Hill v. Commercial Union Assur. Co.*, 164 Mass. 406, 41 N. E. Rep. 657; *Richards v. Continental Ins. Co.*, 83 Mich. 508, 47 N. W. Rep. 350; *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (U. S.), 527; *American Ins. Co. v. Walston*, 111 Ill. App. 133.

2. *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570.

RULE 14.

Ignorance and Misrepresentation as to Law — Mistake of Fact.

In equity, ignorance of the law and misrepresentations as to the law may be in some cases *elements*, in connection with other circumstances of relievable fraud or mistake,¹ and so a settlement may be opened on ground of a mistake of fact, where one party has acted in ignorance, and it would be in effect a fraud to permit the other to have benefit of it,² and this operates in favor of an insurance company as well as against it.³

1. *Titus v. Rochester German Ins. Co.*, 97 Ky. 567, 31 S. W. Rep. 127; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. Rep. 609; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254.

2. *Belt v. American Central Ins. Co.*, 148 N. Y. 624, 43 N. E. Rep. 64, revg. 74 Hun, 448, 26 N. Y. Supp. 692; *Remington v. Westchester Ins. Co.*, 14 R. I. 245.

3. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. Rep. 87; *Mutual Ins. Co. v. Wager*, 27 Barb. 354; *American Ins. Co. v. Barnett*, 73 Mo. 364; *Fire Assoc. v. Blum*, 63 Tex. 282.

RULE 15.

Not Essential in Equity to Return or Tender Amount Received.

Where it is sought by assured in a suit in equity to set aside a settlement and release and to recover the full amount due under the contract of insurance, on ground of fraudulent representations of the company's agent, it is not essential to first repay or tender the amount received in settlement; it is sufficient to make the tender in the complaint or on the trial and ask that the amount be credited or allowed to the company.¹ The rule is otherwise in an action at law on the policy;²

but assured is not obliged to return a draft received in settlement upon repudiation by the company, before proceeding in action on the policy.³

1. *Reynolds v. Westchester Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254.

2. *Harkey v. Mechanics & Traders' Ins. Co.*, 62 Ark. 274, 35 S. W. Rep. 230; *Potter v. Monmouth Ins. Co.*, 63 Me. 440; *Brown v. Hartford Ins. Co.*, 117 Mass. 479; *Home Ins. Co. v. McRichards*, 121 Ind. 121, 22 N. E. Rep. 875; *Pangborn v. Continental Ins. Co.*, 67 Mich. 683; *Home Ins. Co. v. Howard*, 111 Ind. 544, 13 N. E. Rep. 103; *Norwich Union Ins. Co. v. Girtton*, 124 Ind. 217, 24 N. E. Rep. 984; *Riggs v. Home Fire Assoc.*, 61 S. C. 448, 39 S. E. Rep. 614. But see *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. Rep. 609.

3. *Insurance Co. of N. A. v. Osborn*, 26 Ind. App. 88, 59 N. E. Rep. 181.

RULE 16.

Effect of Duress.

Where the assured is compelled by duress of imprisonment or threats of imprisonment under a charge of arson to accept a sum less than what is due, in order to maintain an action on the policy it is not necessary to return or tender the money received.

Springfield F. & M. Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. Rep. 1116; *Hartford Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. Rep. 651.

RULE 17.

Not Necessarily Fraud for Company to Make Indorsement Upon Policy After Fire.

Fraud in settlement cannot be predicated upon action of the insurance company in adding indorsement to policy in its possession after the fire, when same constitutes a mere formal authentication of the contract

as it had been established by proper and sufficient agreement between the parties before the fire.

Belt v. American Central Ins. Co., 29 App. Div. 546, *affd.*, 163 N. Y. 555, without opinion.

RULE 18.

Company May Recover Back Money Paid on Misrepresentation or Fraud.

Money paid to the insured in settlement induced by misrepresentation or fraud may be recovered by the insurance company.

Western Assur. Co. v. Towle, 65 Wis. 247; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Johnson v. Continental Ins. Co.*, 39 Mich. 33; *Berkshire Ins. Co. v. Sturgis*, 13 Gray (Mass.), 177; *McConnell v. Delaware Ins. Co.*, 183 Ill. 228; *Nebraska Ins. Co. v. Segard*, 29 Nebr. 354, 45 N. W. Rep. 681.

RULE 19.

Adjustment of Loss — Legal Business — Right to Follow it in any State.

An insurance company owing a debt to a citizen of a State, although not authorized to transact its business in such State, cannot be restricted by statute from sending its agent or adjuster to such State, to ascertain the amount of the loss or debt, preparatory to payment. Adjustment is a legal business, and an adjuster has the right to follow it in any State where his employment calls him.

French v. People, 6 Colo. 311, 40 Pac. Rep. 463; *People v. Gilbert*, 44 Hun, 522.

Rule otherwise in *Mississippi*, *Moses v. State*, 65 Miss. 56.

CHAPTER THIRD.

Ascertainment of the Loss or Damage.

- TITLE 1.**
1. Location.
 2. Description.
 3. Direct loss or damage by fire.
 4. Amount of loss or damage.
 5. Exemptions, exceptions, and limitations.
 6. Appraisal.

TITLE I.

Location.

- RULE 1.**
1. Location of property as imposed by contract.
 2. Property must be in place specified.
 3. Block of buildings, different numbers but one entrance.
 4. Dwelling and additions.
 5. Effect of separation into items.
 6. General description may cover entire plant.
 7. Factory not necessarily confined to one building.
 8. Admission of parol evidence.
 9. Part of description false.
 10. Usage and custom.
 11. Ambiguity in description of location.
 12. Knowledge or verbal permission of agent.
 13. Written application — Estoppel — Renewal.
 14. Consent of removed agents.
 15. Loss after consent to removal to new location.
 16. Hay in stack.
 17. Rule 1 may be changed or modified by written description.
 18. Removal of property endangered by fire as governed by contract.

RULE 1.

Location of Property as Imposed by Contract.

The insurance is confined or limited to the property described in the policy, "while located and contained as described therein, and not elsewhere."

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain the clause above quoted. See Rule 18.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Property Must be in Place Specified.

There can be no recovery for property destroyed in any other place than that specified and described.

Davison v. London & Lancashire Ins. Co., 189 Pa. St. 132, 42 Atl. Rep. 2, 28 Ins. L. J. 152; *L'Anse v. Fire Assoc.*, 119 Mich. 427, 78 N. W. Rep. 465, 28 Ins. L. J. 369; *Benton v. Farmers' Ins. Co.*, 102 Mich. 281, 60 N. W. Rep. 691; *Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476, 62 N. W. Rep. 783, 24 Ins. L. J. 545; *Green v. Liverpool, L. & G. Ins. Co.*, 91 Iowa, 615, 60 N. W. Rep. 189, 24 Ins. L. J. 180; *British-American Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. Rep. 60, 27 Ins. L. J. 538; *Birnstein v. Stuyvesant Ins. Co.*, 83 App. Div. 436, 82 N. Y. Supp. 140; *Saunders v. Agricultural Ins. Co.*, 2 App. Div. 223, 37 N. Y. Supp. 769; *Bahr v. National Ins. Co.*, 80 Hun, 309, 29 N. Y. Supp. 1031; *Leventhal v. Home Ins. Co.*, 32 Misc. 685, 66 N. Y. Supp. 502; *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273; *Lyons v. Providence-Washington Ins. Co.*, 14 R. I. 109; *Eaton v. Phoenix Ins. Co.*, 15 Ky. L. R. 441; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Maryland Ins. Co. v. Gusdorf*, 43 Md. 506; *Bradbury v. Fire Assoc.*, 80 Me. 396, 15 Atl. Rep. 34; *Farmers' Ins. Assoc. v. Kryder*, 5 Ind. App. 430; *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. Rep. 708; *Ætna Ins.*

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

Co. v. Brannon, Tex. Civ. App. , 81 S. W. Rep. 560.
See Rule 9.

Under the old forms it was occasionally held that the words "contained in" were not limited in their application to specific place described, and that property might be elsewhere covered according to the natural and ordinary use. *Niagara Ins. Co. v. Elliot*, 85 Va. 962, and cases cited. And see *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. Rep. 708.

RULE 3.

Block of Buildings, Different Numbers but One Entrance.

Description of goods as contained in block "situate Nos. 82-90 Street" may cover and include goods in loft or a story of No. 80, where only entrance is at No. 82;¹ but otherwise where the other building has independent means of access, and separated by independent walls.²

1. *Westfield Cigar Co. v. Insurance Co. of N. A.*, 169 Mass. 382, 47 N. E. Rep. 1026. And see *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307.

2. *Sampson v. Security Ins. Co.*, 133 Mass. 49.

RULE 4.

Dwelling and Additions — Mill Sheds.

Where policy describes and covers "dwelling and additions thereto" it continues to cover a kitchen addition still used for the same purpose, removed to a distance of thirty feet; the words "located and contained" in Rule 1 may be construed as applying to personal property only;¹ the words "belonging with the dwelling-house" may be construed to apply to a building 189 feet distant from the dwelling.² "Mill sheds" may be construed to cover sheds at distance from the mill, and not limited to those projecting from the mill itself.³

1. *Hannon v. Hartford Ins. Co.*, 41 App. Div. 226, 58 N. Y. Supp. 549.

2. *Robinson v. Pennsylvania Ins. Co.*, 87 Me. 399, 32 Atl. Rep. 996, 25 Ins. L. J. 56. See also "Description."

3. *Wolverine Lumber Co. v. Palatine Ins. Co.*, Mich. .
102 N. W. Rep. 991.

RULE 5.**Effect of Separation into Items.**

Where policy is divided into separate items as \$. . . . In one-story frame metal roof building situate on a certain lot or plot, \$. on boiler and engine " while contained in above-described building," \$. on machinery, tools, and patterns and other tools, without any limitation as to building or location as in previous item,— it covers patterns in a pattern-house, a part of the plant, on the lot or plot but separate and distinct from the building described in the first item.

Ætna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. Rep. 934.

RULE 6.**General Description May Cover Entire Plant.**

Where policy insures two separate buildings of a plant, one a foundry and machine shop, and the other a pattern shop, the latter being used for storage of the patterns when not required for use in the machine shop; and patterns described in the policy as being in the pattern shop, but the description in the policy of all the property insured ending with " all situate corner of certain streets," it covers patterns destroyed while in use in the machine shop, although the fire does not extend to the pattern shop.

McKeesport Machine Co. v. Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. Rep. 16. And see *Washington Ins. Co. v. Davison*, 30 Md. 91.

RULE 7.**Factory not Necessarily Confined to One Building.**

Where the description covers goods or stock in a " factory," the word " factory " is not necessarily to

be confined to one building, but may extend to all used in connection for the same purpose.

Lieberstein v. Baltic Ins. Co., 45 Ill. 301; *Blake v. Exchange Ins. Co.*, 12 Gray (Mass.), 265. And see *Texas Banking Co. v. Hutchins*, 53 Tex. 61.

RULE 8.

Admission of Parol Evidence.

If a building is accurately described and there is no ambiguity, parol evidence is not admissible in action upon the policy to show that another building was intended.

Sanders v. Cooper, 115 N. Y. 279; *Boak Fish Co. v. Manchester Fire Ins. Co.*, 84 Minn. 419, 87 N. W. Rep. 932.

RULE 9.

Part of Description False.

If there is enough of the description true to identify the location and the property in accordance with the intention, the fact that part of the description is a mistake or is false, does not prevent recovery upon the policy;¹ it is not necessary to reform it.²

1. *Insurance Co. v. Lewis*, 48 Tex. 622; *Texas Ins. Co. v. Stone*, 49 Tex. 4; *Hatch v. New Zealand Ins. Co.*, 67 Cal. 122; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Meadowcraft v. Standard Ins. Co.*, 61 Pa. St. 91; *American Central Ins. Co. v. McLanathan*, 11 Kans. 533; *Baker v. State Ins. Co.*, 31 Oreg. 41, 48 Pac. Rep. 699; *Connelly v. Guardian Ins. Co.*, 30 N. B. 316, *affd.*, 20 Can. Sup. 208; *Edwards v. Fireman's Ins. Co.*, 43 Misc. 354, 87 N. Y. Supp. 507.

2. *Phoenix Ins. Co. v. Gebhard*, 32 Nebr. 144, 49 N. W. Rep. 333; *Omaha Ins. Co. v. Dufek*, 44 Nebr. 241, 62 N. W. Rep. 465; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267.

RULE 10.

Usage and Custom.

Usage and custom may lengthen or extend the precise boundary of location described as a "yard"—as "ship yard;"¹ but description of lumber as "in yard" cannot be construed as a clearing in a forest; a local usage giving such meaning to the word "yard" is not binding, unless both parties had knowledge of it and contracted with reference to it.²

1. *Webb v. National Fire Ins. Co.*, 2 Sandf. (N. Y.) 497.

2. *Cook v. Loew*, 34 Misc. 276. And see "Construction."

RULE 11.

Ambiguity in Description of Location.

An ambiguity in description of location is removable by parol testimony as to intention and surrounding circumstances,¹ reformation is not necessary;² but reformation is necessary when building is wrongly described as located on a certain section.³

1. *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Yonkers Ins. Co. v. Hoffman Ins. Co.*, 6 Robt. (N. Y.) 316; *Lycoming Ins. Co. v. Sailer*, 67 Pa. St. 108; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Fair v. Manhattan Ins. Co.*, 112 Mass. 320; *Massell v. Protective Ins. Co.*, 19 R. I. 565, 35 Atl. Rep. 209; *Holter Lumber Co. v. Firemen's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. Rep. 207.

2. *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308.

3. *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440, 46 N. W. Rep. 906. See Rule 8, and see "Construction."

RULE 12.

Knowledge or Verbal Permission of Agent.

The application of Rule 1 is not affected by knowledge or verbal permission of the agent who issues the policy;¹ or by written indorsement of the agent after the fire.²

1. *Farmers' Ins. Assoc. v. Kryder*, 5 Ind. App. 430.

2. *St. Onge v. Westchester Ins. Co.*, 80 Fed. Rep. 703, 26 Ins. L. J. 1017. But see and compare *Pollock v. German Ins. Co.*, Mich. , 86 N. W. Rep. 1017, and volume 2, title "Agents."

RULE 13.

Written Application — Estoppel — Renewal.

Where written application, made part of the policy, wrongly describes the subject or location of the insured property, and such application and policy were made by the company's agent having knowledge of the facts, it may operate as an estoppel preventing the company from setting up such misdescription as a defense;¹ and so when the policy is renewed with knowledge of a change in location, but in same building described.²

1. *Phoenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. Rep. 85.

2. *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379. See "Waiver."

RULE 14.

Consent of Removed Agents.

Where no notice is given to the company, or its authorized agent, of the removal of property insured to a new location, and no consent to such removal is indorsed upon the policy, an oral consent of agents who have been removed as such is a nullity.

Burlington Ins. Co. v. Campbell, 42 Nebr. 208, 24 Ins. L. J. 379, 60 N. W. Rep. 599.

RULE 15.

Loss After Consent to Removal to New Location.

A consent indorsed on the policy to cover same property in new location does not prevent valid claim for a loss happening in old location before removal;¹ and when part of property is removed to new location, and there destroyed, insured is entitled to recover his whole loss, and cannot be required to prorate with what was left in old location.² Consent to removal does not cover property while in transit.³ When consent is given it is operative, notwithstanding a prior removal to another location, without consent.⁴

1. *Kunzze v. American Exchange Ins. Co.*, 41 N. Y. 412.

2. *Westchester Ins. Co. v. McAdoo*, 57 S. W. Rep. (Tenn.) 409, *affd. orally* by Supreme Court, 412.

3. *Goodhue v. Hartford Ins. Co.*, 184 Mass. 41, 67 N. E. Rep. 645.

4. *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 119, 61 N. E. Rep. 712.

RULE 16.

Hay in Stack.

Where policy covers a barn or stable and a specified amount "on hay therein *or in stack*", it may cover hay in stack some distance from the barn.

Soli v. Farmers' Mut. Ins. Co., 51 Minn. 24, 52 N. W. Rep. 979, 21 Ins. L. J. 908; *Sawyer v. Dodge County Ins. Co.*, 37 Wis. 503.

RULE 17.

Rule 1 May be Changed or Modified by Written Description.

The written description in the policy may modify or waive the limitation as to place or location imposed by Rule 1; for instance, where it covers a threshing machine or combined harvester and described as in use or not in use, or while operating and in transit, etc.;¹

and so in case of a vessel or boat,² unless limited by express terms or warranty;³ and so in case of a horse insured against lightning while in use, etc.,⁴ or oil "while contained in a tank;"⁵ or property "in transit."⁶

1. *Slinkard v. Manchester Assur. Co.*, 122 Cal. 595, 55 Pac. Rep. 417; *Bernicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468, 32 Pac. Rep. 512; *Mawhinney v. Southern Ins. Co.*, 98 Cal. 184, 32 Pac. Rep. 945; *Minneapolis Threshing Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 58 N. W. Rep. 819, 23 Ins. L. J. 734. And see *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. Rep. 708.

2. *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun, 108; *Mark v. National Ins. Co.*, 24 Hun, 565, *affd.*, 91 N. Y. 663, on opinion below; *Hennesey v. Manhattan Ins. Co.*, 28 Hun, 98; *Teutonia Ins. Co. v. Boylston Ins. Co.*, 20 Fed. Rep. 148.

3. *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 168.

4. *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352.

5. *Western Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. Rep. 665.

6. *Northern Pacific Express Co. v. Traders' Ins. Co.*, 183 Ill. 356, 55 N. E. Rep. 702; *Phoenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265, *affd.*, 182 Ill. 33.

RULE 18.

Removal of Property Endangered by Fire as Governed by Contract.

If property covered by the policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of the policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only cover the property so removed in the new location; if removed to more than one location, such excess of the policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such

new locations; but the company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

prohibits removal and provides that if removal of property "be necessary for the preservation of the property from fire, the policy shall be valid without the assent of the company for five days thereafter."

In South Dakota form the same, except the words "or water," are added after the word "fire."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

TITLE II.

Description.

- RULE**
1. Description must apply to property.
 2. Addition of words after fire.
 3. Description false in part only.
 4. Repugnancy or inconsistency between written description and printed conditions.
 5. Doubtful meaning — Admission of parol evidence.
 6. Description uncertain in application or ambiguous.
 7. General words controlled by specific condition.
 8. Knowledge of agent.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

- RULE 9.** Description governed by nature and usual methods of business — Presumption.
10. Limitation as to presumption.
 11. Usage or custom.
 12. Stocks of merchandise.
 13. Building and addition.
 14. Building and addition attached.
 15. Limitation upon permission for addition.
 16. Adjoining and communicating as applied to buildings.
 17. Mill building and additions.
 18. Adjoining and communicating as a question of fact.
 19. Consent to addition does not increase amount of insurance.
 20. Effect of moving part of building.
 21. Certain described building does not include one subsequently built.
 22. Building includes connecting walls.
 23. Knowledge of company — Wrong description may be immaterial.
 24. Building includes permanent fixtures.
 25. Boiler, engine, and machinery.
 26. Intention as affecting permanent fixtures.
 27. Fixtures of a tenant.
 28. Store fixtures.
 29. Merchandise and packages not specifically insured.
 30. Construction of description broad and liberal.
 31. When language plain and clear, construction not forced to favor assured.

RULE 1.

Description Must Apply to Property.

The description must apply to the property damaged or destroyed and for which claim is made;¹ and the property must have been in existence to render the contract of insurance valid.²

1. *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516, 51 N. W. Rep. 29; *Goddard v. Monitor Ins. Co.*, 108 Mass. 56.

2. *Clark v. Insurance Co. of N. A.*, 89 Me. 26, 35 Atl. Rep. 1008, 35 L. R. A. 276.

RULE 2.**Addition of Words After Fire.**

The addition of words to the description, made by the assured after a fire, making it cover and include certain articles, is such a material change or alteration that unless done by the authority or consent of the company it voids the policy.

Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. Rep. 490.

RULE 3.**Description False in Part Only.**

False part of a description will be disregarded, if enough remains to identify the property.

Hatch v. New Zealand Ins. Co., 67 Cal. 122; *Home Ins. Co. v. Lewis*, 48 Tex. 622. And see "Location."

RULE 4.**Repugnancy or Inconsistency Between Written Description and Printed Conditions.**

The written part or description inserted in the policy controls the printed conditions, which if repugnant or inconsistent must give way to such part or description¹ but not where they can be construed as consistent and without conflict.²

1. *Mascott v. Granite State Ins. Co.*, 68 Vt. 253, 35 Atl. Rep. 75; *Tubb v. Liverpool, L. & G. Ins. Co.*, 106 Ala. 651, 17 So. Rep. 615, 25 Ins. L. J. 365; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. Rep. 189; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464, 27 Ins. L. J. 584; *Bryant v. Poughkeepsie Ins. Co.*, 17 N. Y. 200; *Hall v. Insurance Co.*, 58 N. Y. 292; *Steinbach v. Lafayette Ins. Co.*, 54 N. Y. 90; *Corrigan v.*

Lycoming Ins. Co., 53 Vt. 418; Whitmarsh *v.* Conway Ins. Co., 16 Gray (Mass.), 359; Franklin Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Archer *v.* Merchants' Ins. Co., 43 Mo. 434; Phoenix Ins. Co. *v.* Taylor, 5 Minn. 492; Russell *v.* Manufacturers & Builders' Ins. Co., 50 Minn. 409, 52 N. W. Rep. 906; Liverpool, L. & G. Ins. Co. *v.* Van Os, 63 Miss. 431. And see Rule 6, and cases cited.

2. Steinbach *v.* Relief Ins. Co., 13 Wall. (U. S.) 183; Liverpool, L. & G. Ins. Co. *v.* Gunther, 116 U. S. 113; Birmingham Ins. Co. *v.* Kroegher, 83 Pa. St. 64; Lancaster Ins. Co. *v.* Lenheim, 89 Pa. St. 497; Cobb *v.* Insurance Co. of N. A., 17 Kans. 492; Beer *v.* Forest City Ins. Co., 39 Ohio St. 109. And see "Construction."

RULE 5.

Doubtful Meaning—Admission of Parol Evidence.

Where description of property is of doubtful interpretation, evidence is admissible of extraneous facts or of surrounding circumstances which will place the court in the situation of the parties when the contract was made, in order to enable it to be read understandingly; but this rule does not apply where the policy is certain in its language or terms.

Arlington Mfg. Co. *v.* Norwich Union Ins. Co., 107 Fed. Rep. 662, 46 C. C. A. 542; Cummins *v.* German-American Ins. Co., 197 Pa. St. 62, 46 Atl. Rep. 902; Connecticut Ins. Co. *v.* Hilbrant (Tex. Civ. App.), 73 S. W. Rep. 558.

RULE 6.

Description Uncertain in Application or Ambiguous.

If the language used in the description is uncertain in its application, or is ambiguous, parol evidence is admissible in aid of the interpretation and application; as for instance, when applied to buildings, or the policy describes the subject of the insurance as stock in trade

or "such articles as are usually kept" in a certain trade or occupation, or as to what articles are included in a generic term or word, indicating a class, of property,¹ it is ordinarily a question of fact;² but parol evidence is not admissible to change or alter the contract.³

1. (See cases cited under Rule 4.) *Saunders v. Agricultural Ins. Co.*, 39 App. Div. 631, 57 N. Y. Supp. 683; *Rickerson v. German-American Ins. Co.*, 6 App. Div. 550; *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307; *Pfeifer v. National Ins. Co.*, 62 Minn. 536, 64 N. W. Rep. 1018, 25 Ins. L. J. 134; *Boak Fish Co. v. Manchester Fire Assur. Co.*, 84 Minn. 419, 87 N. W. Rep. 932; *Graybill v. Penn Township Ins. Assoc.*, 170 Pa. St. 75, 32 Atl. Rep. 632; *Stover v. Elliot Ins. Co.*, 45 Me. 175; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Snow v. Carr*, 61 Ala. 363; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326; *Niagara Ins. Co. v. De Graff*, 12 Mich. 124. And see *Plinsky v. Germania Ins. Co.*, 32 Fed. Rep. 47; *German-American Ins. Co. v. Commercial Ins. Co.*, 95 Ala. 469; *Menk v. Home Ins. Co.*, 76 Cal. 50; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Davis v. Anchor Ins. Co.*, 96 Iowa, 70; *Westfield Cigar Co. v. Insurance Co. of N. A.*, 165 Mass. 541; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Eddy Foundry v. Farmers' Ins. Co.*, 5 R. I. 426; *Continental Ins. Co. v. Pruitt*, 65 Tex. 125; *Home Ins. Co. v. Roe*, 71 Wis. 33.

2. *Tesson v. Atlantic Ins. Co.*, 40 Mo. 33; *Niagara Ins. Co. v. De Graff*, *supra*; *Bassell v. American Ins. Co.*, 2 Hughes, 531 (U. S. Cir.); *Hewitt v. Watertown Ins. Co.*, 55 Iowa, 323; *James River Ins. Co. v. Merritt*, 47 Ala. 387; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418.

3. *Lancaster Mills v. Merchants Co.*, 89 Tenn. 1, 14 S. W. Rep. 317; *Beer v. Insurance Co.*, 39 Ohio St. 109.

RULE 7.

General Words Controlled by Specific Condition.

General words of description as "articles usually kept," etc., or held in trust or on commission," etc., cannot be construed to cover and include property as to which the policy in terms provides there is no liabil-

ity unless specifically insured, such as "patterns"¹ or "goods stored;"² and so a "building" does not include "store fixtures" when policy provides that there is no liability therefor unless specifically assumed.³

1. *Johnson v. Niagara Ins. Co.*, 118 N. C. 643, 24 S. E. Rep. 424. And see *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136.

2. *Home Ins. Co. v. Gwathmey*, 82 Va. 923.

3. *Commercial Ins. Co. v. Allen*, 80 Ala. 571; *Banyer v. Albany Ins. Co.*, 85 App. Div. 122, 83 N. Y. Supp. 65.

RULE 8.

Knowledge of Agent.

The application or construction of the written description when the meaning is doubtful, uncertain, or ambiguous may be governed by the knowledge or declarations of the agent when he issued the policy;¹ but not when the language is plain and the effect would be to make another and different contract.²

1. *Benedict v. Ocean Ins. Co.*, 1 Daly, 8, affd., 31 N. Y. 389; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Pettit v. State Ins. Co.*, 41 Minn. 299, 43 N. W. Rep. 378; *James River Ins. Co. v. Merritt*, 47 Ala. 387; *Greenwich Ins. Co. v. State*, Ark., 84 S. W. Rep. 1025. And see *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717; *Hartford Ins. Co. v. Moore*, 13 Tex. Civ. App. 644, 36 S. W. Rep. 146.

2. *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. Rep. 212; *Franklin Ins. Co. v. Martin*, 11 Vroom (N. J.), 568; *Holmes v. Charlestown Ins. Co.*, 10 Metc. (Mass.) 211; *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 374, 23 N. E. Rep. 210; *Thomas v. Commercial Union Ins. Co.*, 162 Mass. 29, 37 N. E. Rep. 672.

RULE 9.

Description Governed by Nature and Usual Methods of Business — Presumption.

The construction of the written description is governed by the nature and usual methods of the business

in which the insured or described property is employed, as the insurance company is presumed to have had these considerations in mind when they wrote and issued the policy.

Collins v. Charlestown Ins. Co., 76 Mass. 155; *Mayor v. Exchange Ins. Co.*, 9 Bosw. 424; *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537, *affd.*, 39 N. Y. 45; *Washington Ins. Co. v. Davison*, 30 Md. 91; *Hall v. Insurance Co. of N. A.*, 58 N. Y. 292; *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun, 108; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450; *Plinsky v. Germania Ins. Co.*, 32 Fed. Rep. 47; *Yoch v. Home Ins. Co.*, 111 Cal. 503; *Kenton Ins. Co. v. Downs*, 90 Ky. 236; *Maril v. Connecticut Ins. Co.*, 95 Ga. 604; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Carlin v. Western Ins. Co.*, 57 Md. 515; *Hartwell v. California Ins. Co.*, 84 Me. 524; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Wilson Drug Co. v. Phoenix Ins. Co.*, 110 N. C. 350; *Fraim v. National Ins. Co.*, 170 Pa. St. 151; *Mascott v. Granite Ins. Co.*, 68 Vt. 253.

RULE 10.

Limitation as to Presumption.

The presumption as to knowledge of the company as to use of certain articles in business insured extends only to such as are necessarily and usually used.

McFarland v. Peabody Ins. Co., 6 W. Va. 425.

RULE 11.

Usage or Custom.

The construction or application of the written description may be affected or governed by usage or custom.

Fowler v. Aetna Ins. Co., 7 Wend. 270; *Wall v. Howard Ins. Co.*, 14 Barb. 383; *Daniels v. Hudson River Ins. Co.*, 12 Cush.

(Mass.) 416; *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun, 108; *Mooney v. Howard Ins. Co.*, 138 Mass. 375. And see *Texas Banking Co. v. Hutchins*, 53 Tex. 61. And see "Construction;" "Usage and Custom."

RULE 12.

Stocks of Merchandise — Property Under General Description.

Stock of merchandise is not limited to that on hand when policy issues, but is replaced and covered by subsequent purchases or additions; all that is in the store or building at time of fire, answering to the description in the policy, is covered,¹ and so where policy insures "horses, oxen, young cattle, and sheep;"² or "grain, malt, or grain in process of malting;"³ or "wagons, sleighs, and harness;"⁴ farm implements.⁵

1. *Manchester Ins. Co. v. Feibelman*, 118 Ala. 308, 23 So. Rep. 759, 27 Ins. L. J. 855; *Peoria Ins. Co. v. Anaporo*, 51 Ill. 283; *American Central Ins. Co. v. Rothschild*, 82 Ill. 166; *Planters' Ins. Co. v. Engle*, 52 Md. 468; *Bradbury v. Fire Assoc.*, 80 Me. 396; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 424.

2. *Tomkins v. Hartford Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184.

3. *Coleman v. Phoenix Ins. Co.*, 3 App. Div. 65, 38 N. Y. Supp. 985; *Johnston v. Phelps Co. Ins. Co.*, Nebr., 102 N. W. Rep. 72.

4. *Beyer v. St. Paul F. & M. Ins. Co.*, 112 Wis. 138, 88 N. W. Rep. 57.

5. *Johnson v. Farmers' Ins. Co.*, Iowa, , 102 N. W. Rep. 502.

RULE 13.

Building and Addition.

Where policy describes a building "and addition," the word "addition" is not extended by construction to apply to another distinct and independent building twenty feet distant;¹ nor to an independent building in the rear, although it is possible to crawl from the win-

dows of one to the other, but no other connection between the two, and one in rear being used for a different purpose than specified in the policy;² but it may be otherwise when the building claimed to be an addition is occupied the same, and nothing else existing as an "addition;"³ or when the buildings are connected by a shaft transmitting power and spout for carrying shavings, although separated by a roadway;⁴ or where the buildings are connected by boards nailed to both;⁵ or where there is ambiguity or uncertainty in the description.⁶

1. *Franklin Ins. Co. v. Hellerick*, Ky. , 49 S. W. Rep. 1066, 20 Ky. L. Rep. 1703.

2. *Rickerson v. German-American Ins. Co.*, 85 Hun, 266, 32 N. Y. Supp. 1026. Subsequent appeal, 6 App. Div. 550. And see Rule 6.

3. *Phoenix Ins. Co. v. Martin*, 16 So. Rep. 417, 24 Ins. L. J. 319 (Miss.).

4. *Home Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. Rep. 594.

5. *Cargill v. Millers' Ins. Co.*, 33 Minn. 90. And see *Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763.

6. *Cummins v. German-American Ins. Co.*, 197 Pa. St. 62, 46 Atl. Rep. 902. And see Rule 6, and cases cited. See also "Location."

RULE 14.

Building and Addition Attached.

A description of building and "additions attached" will cover and include another building, mainly on rear of an adjacent lot, but extending over and against the rear of the main building two inches, when occupied by the assured in business insured, and being only addition to answer the description.

Maisel v. Fire Assoc., 59 App. Div. 461, 69 N. Y. Supp. 181.

RULE 15.**Limitation upon Permission for Addition.**

A permission for "additions, alterations, and repairs" is limited in its application to the property certainly described in the policy, and cannot be extended by construction or admission of parol evidence to a separate building not included in or covered by the description;¹ a permit may in terms cover the additions.² When description may be construed as extending to entire plant, the word "additions" refers to additions to the plant, and includes new buildings constructed thereon.³

1. *Arlington Mfg. Co. v. Norwich Union Ins. Co.*, 107 Fed. Rep. 662, 46 C. C. A. 542.

2. *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781.

3. *Arlington Co. v. Colonial Assur. Co.*, 180 N. Y. 337, 73 N. E. Rep. 34.

RULE 16.**Adjoining and Communicating as Applied to Buildings.**

The words "adjoining and communicating," as applied to buildings, must be construed to correspond with the intention of the parties, to be ascertained from the whole instrument, the nature of the property to which the language of the policy is to be applied, the purpose for which property is ordinarily to be used, its situation, and the manner in which it is usually kept.

Marsh v. Concord Ins. Co., 71 N. H. 253, 51 Atl. Rep. 898.

For construction of the word "group," as applied to buildings in a series of items in a policy upon an entire plant, see *A. A. Griffing Co. v. Liverpool, L. & G. Ins. Co.*, N. J. L. , 54 Atl. Rep. 409.

RULE 17.**Mill Building and Additions.**

A description of property as a mill building and "all additions adjoining or communicating," covers and includes an engine and dryhouse, used and owned

by assured in the same business, connected with the main structure by a movable bridge.

Marsh v. New Hampshire Ins. Co., 70 N. H. 590, 49 Atl. Rep. 88; *Marsh v. Concord Ins. Co.*, 71 N. H. 253, 51 Atl. Rep. 898.

RULE 18.

Adjoining and Communicating as a Question of Fact.

Where policy describes building and its additions "adjoining and communicating," it may be a question of fact, and its determination as such by a jury will not be disturbed on appeal.

Carpenter v. Allemania Ins. Co., 156 Pa. St. 37, 26 Atl. Rep. 781, 22 Ins. L. J. 634.

RULE 19.

Consent to Addition Does not Increase Amount of Insurance.

Company's consent to the erection of an additional building does not operate to increase the amount of insurance, or as insurance thereon, when the amount of the policy is exhausted in its appropriation to several items specified in the policy as originally written.

Nappanee Furniture Co. v. Vernon Ins. Co., 10 Ind. App. 319, 37 N. E. Rep. 1064, 23 Ins. L. J. 871.

RULE 20.

Effect of Moving Part of Building.

A shed structure or "lean to" continues to be a part of a building described, although moved back about twenty feet, the intervening space being filled with an addition to the main building to within three feet of the shed and connected with it by a platform nailed to

both structures, with doors in each for convenient passage.

Gross v. Milwaukee Mechanics' Ins. Co., 92 Wis. 656, 66 N. W. Rep. 712, 25 Ins. L. J. 631.

RULE 21.

Certain Described Building Does not Include One Subsequently Built.

A certain described building does not include or cover a building subsequently built, at the end with separate roof, and there being no access from one building to the other through the walls.

Forbes v. American Ins. Co., 164 Mass. 402, 41 N. E. Rep. 656, 25 Ins. L. J. 101.

RULE 22.

Building Includes Connecting Walls.

Policy covering building front and rear includes the connecting walls.

Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. Rep. 472, 24 Ins. L. J. 531.

RULE 23.

Knowledge of Company — Wrong Description May be Immaterial.

Description of a building as "a three-story building," is immaterial when the company had knowledge of the particular house intended, and when the basement, main floor, and attic may be counted each as a story;¹ and description as a shingle roof when in fact a clapboard roof is immaterial.²

1. *Massell v. Protective Ins. Co.*, 19 R. I. 565, 35 Atl. Rep. 209.

2. *Morris v. Farmers' Ins. Co.*, 65 Mo. App. 632.

RULE 24.

Building Includes Permanent Fixtures.

"Building" includes immovable or permanent fixtures a part of it.¹ There are three requisites to a fixture: first, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose for which this part of the realty with which it is connected is appropriated; third, the intention of the party making the annexation to make a permanent accession to the freehold.² A furnace and boiler furnishing hot water, intended by owner as a permanent improvement to his house, and not easily detachable, are fixtures and a part of the building.³

1. *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; *Commercial Ins. Co. v. Allen*, 80 Ala. 571; *Hale v. Springfield Ins. Co.*, 46 Mo. App. 508; *Adams v. Greenwich Ins. Co.*, 9 Hun, 45, affd., 70 N. Y. 166; *Niagara Ins. Co. v. Heenan*, 181 Ill. 575, 54 N. E. Rep. 1052.

2. *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552.

3. *West v. Farmers' Ins. Co.*, 117 Iowa, 147, 90 N. W. Rep. 523.

Whether "fixtures" are a part of the building insured depends upon the various relations borne by the assured, such as landlord and owner or tenant, mortgagor or mortgagee, heir or executor; depending upon original intention and manner of annexation to the building. It must be determined by evidence in each case. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. Rep. 393, 25 Ins. L. J. 529.

RULE 25.

Boiler, Engine, and Machinery.

Boiler, engine, and machinery, built in and firmly attached to a building upon permanent foundations and inclosed in brick wall, form part of a building

within meaning of valued insurance acts, requiring payment of full amount of insurance on buildings.

British-American Assur. Co. *v.* Bradford, 60 Kans. 82, 55 Pac. Rep. 335, 28 Ins. L. J. 262; Insurance Co. *v.* Luce, 11 Ohio C. C. 476.

RULE 26.

Intention as Affecting Permanent Fixtures.

The intention to make certain machinery a permanent part of the building to which it is attached must be gathered from the situation and circumstances surrounding the transaction, and from what was said and done at the time.

Washington Nat. Bank *v.* Smith, 15 Wash. 160, 45 Pac. Rep. 736, 26 Ins. L. J. 183.

RULE 27.

Fixtures of a Tenant.

Where fixtures of a tenant are insured as such the company cannot claim that they are a part of the building belonging to the landlord.

Clark *v.* Svea Ins. Co., 102 Cal. 252, 30 Pac. Rep. 587, 23 Ins. L. J. 876.

RULE 28.

Store Fixtures.

Store fixtures is not to be determined by the meaning of the word "fixtures" as between landlord and tenant, mortgagor and mortgagee, etc., but is more comprehensive and includes store fittings or fixed furniture peculiarly adapted to make a room a store.

Thurston *v.* Union Ins. Co., 17 Fed. Rep. 127.

RULE 29.

Merchandise and Packages not Specifically Insured.

Description of property as "merchandise and packages for same *not specifically* insured," excludes poultry covered by another policy under the description of "*poultry* and packages for same."

Firemen's Fund Ins. Co. v. Western Refrigerating Co., 162 Ill. 322, 44 N. E. Rep. 746, revg. 55 Ill. App. 329.

RULE 30.

Construction of Description Broad and Liberal.

The construction of the description of insured property should be broad and liberal in favor of the assured:

The word "implement" may include binding twine.¹

The word "grain" may include broom corn (but not the stalks after the seed or grain is threshed out and packed in bales).²

"Millet," hay.³

"Grain and seed," corn and flaxseed in form of oil cakes.⁴

"Furniture" may include a Japanese vase,⁵ carpets, and bed clothing.⁶

"Farming utensils" include a hay press.⁷

"Packages" may include milk cans.⁸

"Furniture and family stores" include books and games, writing materials, child's swing, and walker.⁹

"Merchandise" kept for sale may include articles in use in store.¹⁰

"Household furniture" includes goods, vessels, utensils, and other articles necessary or convenient for housekeeping.¹¹

"Groceries" may include liquors.¹²

"Tools" used in manufacture of boots and shoes may be construed to cover patterns for making them.¹³

"Guano" may include fertilizer.¹⁴

"Grain in stacks" includes flax in stacks.¹⁵

"Eggs in pickle" may include those packed in crates awaiting shipment.¹⁶

"Wholesale stock of drugs, paints, and other goods not more hazardous" includes the whole stock.¹⁷

"Store" means shop and includes a bakery or restaurant.¹⁸

"Building" may be applied to a fishing scow on evidence of its use.¹⁹

"Stock of timber" may include locust capstans partly prepared for vessels in yard of shipbuilder.²⁰

"Stock in trade," as baker may include tools, implements, horse and cart.²¹

"Machinery" may include machines,²² and movable dies,²³ and tools and implements used in the business.²⁴

"Steam sawmill" includes not only the building but machinery.²⁵

"Starch manufactory" includes fixtures necessary to the process.²⁶

"Building" includes cellar wall.²⁷

"Steam farm engine" includes or covers any engine adapted to farm purposes.²⁸

1. *Davis v. Anchor Mut. Ins. Co.*, 96 Iowa, 70, 64 N. W. Rep. 687, 25 Ins. L. J. 299.

2. *Reavis v. Farmers' Ins. Co.*, 78 Mo. App. 14.

3. *Norris v. Farmers' Ins. Co.*, 65 Mo. App. 632.

4. *Marsh Oil Co. v. Aetna Ins. Co.*, 79 Mo. App. 21.

5. *Bowne v. Hartford Ins. Co.*, 46 Mo. App. 474.

6. *Patrons' Society v. Hall*, 19 Ind. App. 119, 49 N. E. Rep. 279.

7. *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273.

8. *Cronin v. Fire Assoc.*, 112 Mich. 106, 70 N. W. Rep. 448.

9. *Huston v. State Ins. Co.*, 100 Iowa, 402, 69 N. W. Rep. 674.
10. *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. Rep. 399, 28 Ins. L. J. 199; *Hartwell v. California Ins. Co.*, 84 Me. 524, 24 Atl. Rep. 954.
11. *Reynolds v. Iowa Ins. Co.*, 80 Iowa, 563, 46 N. W. Rep. 659.
12. *Niagara Ins. Co. v. De Graff*, 12 Mich. 124.
13. *Adams v. N. Y. Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. Rep. 1149.
14. *Planters' Ins. Co. v. Engle*, 52 Md. 468.
15. *Hewitt v. Watertown Ins. Co.*, 55 Iowa, 323.
16. *Hall v. Concordia Ins. Co.*, 90 Mich. 403, 51 N. W. Rep. 524.
17. *Wilson Drug Co. v. Phoenix Assur. Co.*, 110 N. C. 350, 14 S. E. Rep. 790.
18. *Richards v. Washington Ins. Co.*, 60 Mich. 420.
19. *Enos v. Sun Ins. Co.*, 67 Cal. 621.
20. *Webb v. National Ins. Co.*, 2 Sandf. 497.
21. *Moadinger v. Mechanics' Ins. Co.*, 2 Hall, 490.
22. *James River Ins. Co. v. Merritt*, 47 Ala. 387.
23. *Seavy v. Central Ins. Co.*, 111 Mass. 540.
24. *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26.
25. *Bigler v. N. Y. Central Ins. Co.*, 20 Barb. 635, *affd.*, 22 N. Y. 402.
26. *Peoria Ins. Co. v. Lewis*, 18 Ill. 553.
27. *Ervin v. N. Y. Central Ins. Co.*, 3 T. & C. 213.
And that description is liberally construed to cover or include.
See also *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. Rep. 266.
28. *Wilson v. Union Mutual Ins. Co.*, Vt. , 58 Atl. Rep. 799, 75 Vt. 320, 55 Atl. Rep. 662.

RULE 31.

When Language Plain and Clear, Construction not Forced to Favor Assured.

Construction of description is not arbitrarily forced in favor of an assured when language plain and clear:

“Machinery and implements used in business” do not include those carried in stock for sale.¹

The words “usually kept” do not include property held in trust or on commission.²

"Grain in stack" does not include grain in barn.³

"Stock and materials" do not include retorts in a smelting plant.⁴

"Other articles usually kept in a tailor's establishment" do not include patterns, as liability is not thereby specifically assumed under printed condition in regard to patterns.⁵

"Lumber, lath, and pickets" do not include shingles, although if the word "lumber" alone is used it might be otherwise.⁶

"Decorations to walls and ceilings" do not include outside painting.⁷

Policy "on a bridge" does not cover loss of toll.⁸

"Property in freight building" does not include articles which by printed condition must be specifically insured.⁹

"Stock of hair manufactured or in process" does not include fancy goods made of other material, even though usually kept in a retail hair store.¹⁰

"Building permitted to be used for any mercantile purpose" does not include a restaurant.¹¹

"Household furniture" does not include a watch.¹²

"Jewelry and clothing stock" does not include musical and surgical instruments, guns, pistols, and books.¹³

"English, American, and West India goods" do not include tea and nutmegs.¹⁴

"Merchandise" does not include tools and implements.¹⁵

"Materials" do not include benzine, unless commonly used in the business.¹⁶

"Wearing apparel, furniture, and stock" do not in-

clude linen and sheets smuggled and secretly offered for sale.¹⁷

"New bark now being built" does not include materials not put into bark.¹⁸

"Building, occupied as tannery" does not include engine and machinery.¹⁹

"Refined oil" does not include "lard oil."²⁰

"Implements of trade in a glue factory" do not include stationery and boxes.²¹

"Furniture, instruments, appliances, and material incidental to a dental office" do not include dental books.²²

1. *Michel v. American Central Ins. Co.*, 17 App. Div. 87, 44 N. Y. Supp. 832.

2. *Corkery v. Security Ins. Co.*, 99 Iowa, 382, 68 N. W. Rep. 792, 26 Ins. L. J. 331.

3. *Benton v. Farmers' Mutual Ins. Co.*, 102 Mich. 281, 60 N. W. Rep. 691.

4. *American Smelter Co. v. Providence-Washington Ins. Co.*, 64 Mo. App. 438.

5. *Johnston v. Niagara Ins. Co.*, 118 N. C. 643, 24 S. E. Rep. 424, 25 Ins. L. J. 558.

6. *West Branch Lumbermen's Exchange v. American Ins. Co.*, 183 Pa. St. 366, 38 Atl. Rep. 1081, 27 Ins. L. J. 305.

7. *Sherlock v. German-American Ins. Co.*, 21 App. Div. 18, 47 N. Y. Supp. 315.

8. *Farmers' Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. St. 37, 15 Atl. Rep. 563.

9. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136.

10. *Medina v. Builders' Ins. Co.*, 120 Mass. 225.

11. *Garretson v. Merchants' Ins. Co.*, 81 Iowa, 727, 45 N. W. Rep. 1047.

12. *Clary v. Protection Ins. Co.*, Wright (Ohio), 228.

13. *Rafael v. Nashville Ins. Co.*, 7 La. Ann. 244.

14. *Huckins v. People's Ins. Co.*, 11 Fost. (N. H.) 238.

15. *Kent v. Liverpool, L. & G. Ins. Co.*, 26 Ind. 294.

16. *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

17. *Clary v. Protection Ins. Co.*, Wright (Ohio), 227.

- 18. *Mason v. Franklin Ins. Co.*, 12 Gill & J. (Md.) 468.
- 19. *Sunderlin v. Aetna Ins. Co.*, 18 Hun, 522.
- 20. *Weisenburger v. Harmony Ins. Co.*, 56 Pa. St. 442.
- 21. *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 992.
- 22. *American Ins. Co. v. Bell* (Tex. Civ. App.), 75 S. W. Rep. 319.

TITLE III.

Direct Loss or Damage by Fire.

- RULE**
- 1. Loss or damage by fire as imposed by contract.
 - 2. Meaning of direct loss or damage by fire — Proximate cause.
 - 3. What is proximate cause.
 - 4. Damage and expense caused in removing property when endangered by fire.
 - 5. Fall of wall after fire.
 - 6. What loss or damage by fire includes.
 - 7. Smoke and steam — Overheating.
 - 8. Destruction or damage caused by insured after fire.

RULE 1.

Loss or Damage by Fire as Imposed by Contract.

The assured is insured against all direct loss or damage by fire, except as provided otherwise in the policy.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

The standard form of policy prescribed in :

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

insures "against loss or damage by fire."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Meaning of Direct Loss or Damage by Fire — Proximate Cause.

The words "direct loss or damage by fire" mean loss or damage occurring directly from fire as the destroying agency, in contradiction to the remoteness of fire as such agency;¹ but the question as to fire being the proximate cause or not is one of fact to be determined by a jury.²

1. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365; *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635, 25 Ins. L. J. 81; *Lynn Gas Co. v. Meriden Ins. Co.*, 158 Mass. 570, 577.

2. *N. Y. & Boston Express Co. v. Traders & Mechanics' Ins. Co.*, 132 Mass. 377; s. c., 135 Mass. 221.

RULE 3.

What is Proximate Cause.

The proximate cause is the efficient cause — the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or a controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is of course to be charged with the disaster.

Ætna Ins. Co. v. Boon, 95 U. S. 117, 130; *Lynn Gas Co. v. Meriden Ins. Co.*, 158 Mass. 575. And see *Conner v. Manchester Assur. Co.*, 130 Fed. Rep. 743, C. C. A.

RULE 4.

Damage and Expense Caused in Removing Property when Endangered by Fire.

The damage and expense caused in properly performing the duty required in saving or preserving property insured from an apparent imminent destruction by fire are proper to be claimed as against the insurance company;¹ and this is governed not by the result but by the circumstances as they reasonably appeared to the parties at the time.² The obligation to pay such damage is distinctly recognized also in the apportionment clause in the policy.³

1. *White v. Republic Ins. Co.*, 57 Me. 91; *Case v. Hartford Ins. Co.*, 13 Ill. 676. And see *Liebner v. Liverpool, L. & G. Ins. Co.*, 6 Bush (Ky.), 639; *Brad v. Northwestern Ins. Co.*, 11 Mich. 425; *Talamon v. Home Mut. Ins. Co.*, 16 La. Ann. 426; *Insurance Co. of N. A. v. Leader*, Ga., 48 S. E. Rep. 972.

2. *Balestraci v. Firemen's Ins. Co.*, 34 La. Ann. 844.

3. See "Apportionment."

RULE 5.

Fall of Wall After Fire.

If the wall of a building, being weakened by heavy rains, falls twenty-five days after the fire, the fall of the wall cannot be considered the direct result of the fire.

Cuesta v. Royal Ins. Co., 98 Ga. 720, 27 S. E. Rep. 172.

RULE 6.

What Loss or Damage by Fire Includes.

Loss or damage by fire includes not merely the injury done by the combustion, heat, smoke, and expan-

sive effects of the fire, but also by any falling, displacement, or change of quality thereby caused, as well as the injury done by water or chemicals in extinguishing fire, or in moving goods, or trampling on them, or blowing up building in a *bona fide* attempt to extinguish or stay the fire; the company is liable for any loss which is the proximate result of a fire, although fire does not itself extend to place where damage is done;¹ actual ignition or combustion is not necessary,² but the word "fire" cannot be construed to mean heat of a degree too low to cause ignition.³ Damage caused by a fire engine on its way to a fire is not caused by the fire.⁴

1. *Heuer v. Westchester Ins. Co.*, 44 Ill. App. 429; *Cohn v. National Ins. Co.*, 96 Mo. App. 315, 70 S. W. Rep. 259; *John Davis & Co. v. Insurance Co. of N. A.*, 115 Mich. 382, 73 N. W. Rep. 393, 27 Ins. L. J. 184; *Ermentraut v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635, 25 Ins. L. J. 81; *New York & Boston Express Co. v. Traders' Ins. Co.*, 132 Mass. 377; *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570, 33 N. E. Rep. 690.

2. *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305; *Transatlantic Ins. Co. v. Dorsey*, 56 Md. 70; *Ballerstraci v. Firemen's Ins. Co.*, 34 La. Ann. 844.

3. *Gibbons v. German Ins. Co.*, 30 Ill. App. 263.

4. *Foster v. Fidelity Ins. Co.*, 24 Pa. Supr. Ct. 585.

RULE 7.

Smoke and Steam — Overheating.

Damage by smoke from soot in a chimney into which a pipe of a stove enters, and ignited by a fire from the stove, is a loss or damage by fire,¹ but not where the smoke and soot are caused by a lamp flaring up above its chimney;² loss caused by escaping steam is not a loss by fire;³ nor is damage to interior of a boiler, due to overheating from lack of water, loss by

fire;⁴ nor is damage caused by smoke and soot from a defective stovepipe a loss by fire.⁵

1. *Way v. Abington Ins. Co.*, 166 Mass. 67, 43 N. E. Rep. 1032, 25 Ins. L. J. 702. And see *Willow Grove Co. v. Planters' Ins. Co.*, 77 Md. 532.

2. *Samuels v. Continental Ins. Co.*, 2 Pa. Dist. R. 397; *Fitzgerald v. German-American Ins. Co.*, 30 Misc. 72, 60 N. Y. Supp. 824.

3. *Gibbons v. German Ins. Co.*, 30 Ill. App. 263.

4. *American Towing Co. v. German Ins. Co.*, 74 Md. 25, 21 Atl. Rep. 553.

5. *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 35 S. E. Rep. 775.

RULE 8.

Destruction or Damage Caused by Insured After Fire.

Where insured himself after the fire destroys or injures the goods or property, such loss or damage is not by the fire.

Dohman Co. v. Niagara Ins. Co., 96 Wis. 38, 71 N. W. Rep. 69, 27 Ins. L. J. 357.

TITLE IV.

Amount of Loss or Damage.

- RULE** 1. Limitation upon amount of loss or damage as imposed by contract.
2. Amount of policy not the measure of damage.
 3. Construction of doubtful language favors indemnity.
 4. Damage to personal property.
 5. Effect of limitation to cost of repairing or replacing.
 6. Cost of repairing or replacing not necessarily a rule of damage in all cases.
 7. Effect of making policy a valued one — Profits.
 8. Profits to be recoverable must be specifically insured.
 9. Meaning of cash value — Manufacturers.
 10. Manufacturer of machines.
 11. Cash value — Market value.
 12. Auction price as evidence.

- RULE 13.** Allowance for depreciation — Burden of proof.
14. Amount paid for assignment of policy not evidence.
 15. When property is destroyed.
 16. Assured competent witness.
 17. Two-thirds, three-fourths, and coinsurance clauses — Statutes.
 18. Three-fourths clause — Valued-policy statute.
 19. Household furniture and wearing apparel.
 20. Market value of stocks of merchandise — Evidence.
 21. Loss of stock of merchandise, how estimated.
 22. Inventory of goods as evidence.
 23. Estimate of loss may be based on original bills when no books and no inventory.
 24. Inventory and books must be verified as correct.
 25. Property in bonded warehouse.
 26. Efficiency of machines destroyed not affected by those not destroyed.
 27. Evidence of value as limited by time — Property having no market value.
 28. Machine destroyed obtainable from patentee and only one source.
 29. Patterns have no market value.
 30. Loss payable to third party.
 31. Insurance of a tenant.
 32. Reinsurance payable pro rata.
 33. Cost of building not proper measure of damage.
 34. When insurable interest insured extends to whole value of building.
 35. When interest is limited.
 36. Limitation of cost of repairing or replacing as applied to buildings — Effect of local statutes.
 37. Cash value as applied to a building.
 38. Assured not limited to relative value of building for purpose of removal.
 39. Partial loss to building — Effect of building laws.
 40. Measure of damage when building partially destroyed.
 41. Opinions of witness.
 42. Effect of statute fixing value and measure of damage.
 43. Statute fixing amount of loss, makes it a liquidated demand.
 44. Company cannot evade statute fixing amount of loss.
 45. Burden of proof of modification under statute fixing amount of loss.

- RULE 46.** Effect of city ordinances as to repairing or replacing buildings in connection with statute fixing amount of loss.
47. Depreciation when statute makes policy a valued one.
48. Effect of fraud when statute fixes amount of loss — Contract severable.
49. When building is a total loss.
50. When building cannot be said to be totally destroyed — Total loss — Limitations.
51. Total loss as applied to several buildings one entire plant.
52. How total loss ascertained — Tests.
53. Photographs as evidence of total loss.
54. Total loss as question of fact or law.

RULE 1.**Limitation upon Amount of Loss or Damage as Imposed by Contract.**

The insurance company is not liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and the company, or, if they differ, then by appraisers.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,

New Jersey,
North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

In Wisconsin the form is the same except it is preceded "except when otherwise provided by statute."

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

The standard form of policy prescribed in :

Maine, Massachusetts,
provides that "the company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens; * * * the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens."

The standard form of policy prescribed in :

Minnesota,
provides that "the amount of said loss or damage be estimated according to the actual value of the insured property at the time when such loss or damage happens, except in case of total loss on buildings."

In New Hampshire,
same as in Minnesota to and including the word "happens," continuing, "except on buildings totally destroyed, in which case the full amount of the limitation shall be paid."

In South Dakota,
same as in Minnesota to the word "happens," continuing, "except that the amount of insurance written herein upon any real property, including structures on land owned by another than the assured, shall be taken conclusively to be the true value of such property and the amount of loss sustained by, and the measure of damages of, the insured, in case the same is wholly destroyed without criminal fault on the part of the insured or his assigns."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Amount of Policy not the Measure of Damage.

The amount inserted in the policy (unless otherwise expressly agreed or there is a statute to contrary) is neither the proper or correct measure of damage or conclusive as to amount of loss or damage; it limits, but does not govern;¹ when the insurance is itemized in the policy, with separate amounts on each item, there can be no recovery beyond the value of each item and the specified amount.² Policy or insurance continues in force to extent of any balance left in amount after satisfying a loss.³

1. Westchester Ins. Co. v. Wagner, 10 Tex. Civ. App. 398, 30 S. W. Rep. 959, 24 Ins. L. J. 476; Illinois Ins. Co. v. Andes

Ins. Co., 67 Ill. 362; *Dacey v. Agricultural Ins. Co.*, 21 Hun, 83; *Waynesboro Ins. Co. v. Creaton*, 98 Pa. St. 451; *Standard Ins. Co. v. Wren*, 11 Ill. App. 242; *Hanover Ins. Co. v. Lewis*, 23 Fla. 193, 1 So. Rep. 863; *Insurance Co. v. National Bank*, 88 Tenn. 369; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. Rep. 534; *Lion Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. Rep. 45; *Macarty v. Commercial Ins. Co.*, 17 La. 365; *City of Detroit v. Grummond*, 121 Fed. Rep. 963, 58 C. C. A. 301.

2. *Phoenix Ins. Co. v. Pfeifer* (Tex. Civ. App.), 39 S. W. Rep. 1001; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. Rep. 417; *Ætna Ins. Co. v. Glasgow Light Co.*, 107 Ky. 77, 52 S. W. Rep. 975.

3. *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. Rep. 51.

RULE 3.

Construction of Doubtful Language Favors Indemnity.

If meaning or application of the language of the policy is doubtful, the construction favors the larger indemnity.

Meyer v. Queen Ins. Co., 41 La. Ann. 1000; *Illinois Ins. Co. v. Hoffman*, 132 Ill. 522, 24 N. E. Rep. 413. See "Construction."

RULE 4.

Damage to Personal Property.

Where personal property is damaged only, the insurance company is bound for the difference between its value in its sound and damaged condition,¹ unless it is shown that the cost to the insured of repairing or replacing is less than such difference.²

1. *Hoffman v. Western Ins. Co.*, 1 La. Ann. 216.

2. See Rules 1 and 5.

RULE 5.

Effect of Limitation to Cost of Repairing or Replacing.

The difference between the actual cash value of the property insured just before the fire and its value after

the fire ceases to be the measure of indemnity, where policy provides in terms that in no event shall the liability exceed what it would then cost the assured to repair or replace the same with material of like kind and quality.

McCready v. Hartford Ins. Co., 61 App. Div. 583, 70 N. Y. Supp. 778.

RULE 6.

Cost of Repairing or Replacing not Necessarily a Rule of Damage in all Cases.

The cost of repairing or replacing may limit the amount of the claim, but does not necessarily of itself afford a rule or measure of damage in all cases where the policy does not in terms so provide; the option reserved by the insurance company to repair or replace is one which it may adopt or not as it thinks proper.

Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205. And see *Texas Moline Plow Co. v. Niagara Ins. Co.*, Tex. Civ. App., 87 S. W. Rep. 192. See Rules 1 and 5, and "Options of the Insurance Company," "Repair and Rebuild," etc., Chapter Fifth.

RULE 7.

Effect of Making Policy a Valued One — Profits.

Where the policy is a valued one, that is, where the parties intended and have agreed beforehand to estimate the value of the subject of the insurance therein and there is no question of bad faith, fraud, or mistake, the valuation is conclusive upon the parties as to the amount which the assured is entitled to receive, and to that extent it qualifies the principle underlying

the contract as one of indemnity;¹ when the insurance is of *profits* the policy is of necessity a valued one.²

1. *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, affg. 64 App. Div. 182, 71 N. Y. Supp. 918; *Harris v. Eagle Fire Co.*, 5 Johns. 368; *Williams v. Continental Ins. Co.*, 24 Fed. Rep. 767; *Natchez Ins. Co. v. Buckner*, 5 Miss. 63; *Haven v. Gray*, 12 Mass. 71; *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126; *Kane v. Commercial Ins. Co.*, 8 Johns. 229; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367; *Universal Ins. Co. v. Weiss*, 106 Pa. St. 20; *Wallace v. Insurance Co.*, 4 La. Ann. 289.

2. *Mumford v. Hallett*, 1 Johns. 433.

RULE 8.

Profits to be Recoverable Must be Specifically Insured.

Profits are not recoverable unless specifically and distinctly insured as such;¹ or where the interest specifically insured necessarily includes them, as for instance of a contractor moving houses;² or of a lessee in rents;³ or owner of a patent in royalties.⁴

1. *Niblo v. Insurance Co. of N. A.*, 1 Sandf. 551; *Farmers' Mut. Ins. Co. v. New Holland Road Co.*, 122 Pa. St. 37. And see *Mumford v. Hallett*, 1 Johns. 433; *Buffalo Elevator Co. v. Prussian Nat. Ins. Co.*, 64 App. Div. 182, 187, affd., 171 N. Y. 25, 63 N. E. Rep. 810.

2. *Planters' Ins. Co. v. Thurston*, 93 Ala. 255, 9 So. Rep. 268. As to insurance of a contractor's interest, see also *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128; *Ulmer v. Phoenix Ins. Co.*, 61 S. C. 459, 39 S. E. Rep. 712.

3. *Carey v. London Provincial Ins. Co.*, 33 Hun, 315.

4. *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535.

RULE 9.

Meaning of Cash Value — Manufacturers.

In ordinary cases the actual cash value means the market price or value at the time and place destroyed, and the same rule may apply to manufacturers in-

sured; the word "then" in the limiting clause (see Rule 1) "shall not exceed what it would *then* cost the assured to replace," means just what it says and not what it would cost the assured to replace from his own factory after delay of manufacturing or reproducing, etc.;¹ in ascertaining the amount of loss it is not important or conclusive what insured paid for his goods or property, whether in money or otherwise, or whether given to him. In either event he would be entitled to the benefit of his bargain or gift. The only question is as to the fair cash value of the goods destroyed.² The word "then" may be construed as meaning within reasonable time.³

1. *Hartford Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305, 46 S. W. Rep. 851; *Mitchell v. St. Paul German Ins. Co.*, 92 Mich. 594, 52 N. W. Rep. 1017; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422. And see *Parrish v. Virginia Ins. Co.*, N. C., 20 Ins. L. J. 95. And see Rules 10, 11.

2. *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. Rep. 422, 28 L. R. A. 405. See Rule 11.

3. *Texas Moline Plow Co. v. Niagara Ins. Co.*, Tex. Civ. App., 87 S. W. Rep. 192.

RULE 10.

Manufacturer of Machines.

Where insured is a manufacturer and property covered is machines manufactured by him, under the limitation in the policy that in no event should the loss exceed what it would "cost the insured to repair or replace the same with material of like kind and quality," the measure of damage is not the market value of the property destroyed, but what it will cost the insured as a manufacturer to replace it.

Standard Sewing Machine Co. v. Royal Ins. Co., 201 Pa. St. 645, 51 Atl. Rep. 354. See Rule 9.

RULE 11.

Cash Value — Market Value.

Cash value of property at time of the fire means what it would cost the insured in cash to purchase property of like kind and quality;¹ or proof of fair market value is the equivalent of actual cash value;² cost of property may be some evidence of value but is not conclusive;³ cash value cannot include estimated profits.⁴ Evidence of market value and cost of replacing are both admissible, and if they conflict the verdict of a jury is conclusive.⁵

1. *German Ins. Co. v. Everett* (Tex.), 36 S. W. Rep. 125; *Texas Moline Plow Co. v. Niagara Ins. Co.*, Tex. Civ. App., 87 S. W. Rep. 192.

2. *Manchester Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. Rep. 732; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Western Assur. Co. v. Studebaker*, 124 Ind. 176. And see *Manchester Assur. Co. v. Feibelman*, 118 Ala. 308.

3. *Bini v. Smith*, 36 App. Div. 466, 55 N. Y. Supp. 842; *Cheever v. Scottish Union & Nat. Ins. Co.*, 86 App. Div. 328, 83 N. Y. Supp. 730. See Rule 9.

4. *Niagara Ins. Co. v. Heflin* (Ky.), 60 S. W. Rep. 393.

5. *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. Rep. 945. But compare Rules 1, 5, and 6.

RULE 12.

Auction Price as Evidence.

The price damaged goods brings at auction may be evidence of their value after the fire,¹ but is not conclusive.²

1. *Clement v. British-America Assur. Co.*, 141 Mass. 298; *Reading Ins. Co. v. Engelhoff*, 115 Fed. Rep. 393.

2. *Reading Ins. Co. v. Engelhoff*, *supra*.

RULE 13.

Allowance for Depreciation — Burden of Proof.

Cash value should include an allowance, if any, for depreciation,¹ but in event of a trial the burden of

proof in establishing depreciation rests upon the insurance company.²

1. *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. Rep. 583; *Commercial Ins. Co. v. Allen*, 80 Ala. 571. And see Rule 11.

2. *Reade v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665; *Hegard v. California Ins. Co.*, 72 Cal. 535, 14 Pac. Rep. 180.

RULE 14.

Amount Paid for Assignment of Policy not Evidence.

An amount paid for an assignment of the policy is not evidence of the value of the property covered thereby.

Commercial Ins. Co. v. Friedlander, 156 Ill. 595, 41 N. E. Rep. 183, 24 Ins. L. J. 789, affg. 57 Ill. App. 372.

RULE 15.

When Property is Destroyed.

Damage to property to extent that it is rendered useless for purpose used is destruction of it; if any value remains the insurance company is entitled to benefit of it.

Manchester Ins. Co. v. Feibelman, 118 Ala. 308, 329, 23 So. Rep. 759, 27 Ins. L. J. 855. And see *Hoffman v. Western Ins. Co.*, 1 La. Ann. 216.

RULE 16.

Assured Competent Witness.

The assured, or any person who is acquainted with the value of the property destroyed, is competent to give his opinion or evidence as to such value, although

not technically an expert;¹ and it is not disproved by his (assured's) sworn tax list.²

1. *Baille v. Western Assur. Co.*, 49 La. Ann. 658, 21 So. Rep. 736, 26 Ins. L. J. 497; *Western Home Ins. Co. v. Richardson*, 40 Nebr. 1, 58 N. W. Rep. 597, 23 Ins. L. J. 501; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. Rep. 843; *Names v. Union Ins. Co.*, 104 Iowa, 612, 74 N. W. Rep. 14; *Sisk v. American Cent. Ins. Co.*, 95 Mo. App. 695, 69 S. W. Rep. 687; *Phoenix Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. Rep. 1; *Rademacher v. Greenwich Ins. Co.*, 75 Hun, 83, 27 N. Y. Supp. 155; *Machen v. Lamar Ins. Co.*, 11 Ins. L. J. 619; *Glaser v. Home Ins. Co.*, 93 N. Y. Supp. 524; *Tucker v. Colonial Ins. Co.*, W. Va. , 51 S. E. Rep. 86.

2. *German Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. Rep. 534. And see *Probst v. American Central Ins. Co.*, 64 Mo. App. 408.

RULE 17.

Two-thirds, Three-fourths, and Coinsurance Clauses — Statutes.

Such special clauses in the policy limiting the liability to "two-thirds," "three-fourths," and "coinsurance" clauses must be given effect in determining the amount of loss and liability of the company,¹ except when a statute fixes and determines the amount of loss as fixed by the amount of the policy;² but notwithstanding such a statute, may be binding as to personal property.³

1. *Blinn v. Dresden Mut. Ins. Co.*, 85 Me. 389, 27 Atl. Rep. 263, 23 Ins. L. J. 707; *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Millis v. Scottish Union & Nat. Ins. Co.*, 95 Mo. App. 211, 68 S. W. Rep. 1066; *Pennsylvania Ins. Co. v. Moore*, 21 Tex. Civ. App. 528, 51 S. W. Rep. 878; *Roberts v. Insurance Co. of N. A.*, 94 Mo. App. 142, 72 S. W. Rep. 144; *Sun Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. Rep. 180; *Egan v. Mutual Ins. Co.*, 5 Denio, 326; *Brown v. Quincy Ins. Co.*, 105 Mass. 396; *Ervin v. New York Central Ins. Co.*, 3 T. & C. (N. Y.) 213; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Malin v. Mercantile Ins. Co.*, Mo. App. , 80 S. W. Rep. 56.

2. *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *Caledonia Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. Rep. 279, 27 Ins. L. J. 318; *Sachs v.*

London & Lancashire Ins. Co., 113 Ky. 88, 67 S. W. Rep. 23, 23 Ky. L. Rep. 2397; Home Ins. Co. *v.* Bean, 42 Nebr. 537, 60 N. W. Rep. 907, 24 Ins. L. J. 516; Bammesel *v.* Brewers' Ins. Co., 43 Wis. 463.

3. Queen Ins. Co. *v.* Jefferson Ice Co., 64 Tex. 578.

Under the terms of the Mississippi statute such clauses are inoperative as to both real and personal property. Hartford Ins. Co. *v.* Shlenker, 80 Miss. 667, 32 So. Rep. 155; Western Ins. Co. *v.* Phelps, 77 Miss. 625, 27 So. Rep. 745. See statute in chapter twelfth. As amended in 1904, see Vol. 2. As to effect of Wisconsin statute, see Newton *v.* Theresa Ins. Co., Wis., 104 N. W. Rep. 107.

RULE 18.

Three-fourths Clause — Valued Policy Statute.

The three-fourths clause limiting the liability of the company is valid as to personal property where terms of a valued policy statute are limited to real estate or buildings;¹ but is invalid as to buildings.²

1. Hudson *v.* Scottish Union & National Ins. Co., 110 Ky. 722, 62 S. W. Rep. 513; Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. Rep. 611.

2. Scottish Union & National Ins. Co. *v.* Enslie, 78 Miss. 157, 28 So. Rep. 812. And see Rule 17.

RULE 19.

Household Furniture and Wearing Apparel.

When property insured is household furniture and wearing apparel in actual use, if there is a market value, that may afford a proper criterion; if no market value, simple fair value is what is allowable; such value is not necessarily or conclusively determined by what a junk-shop or second-hand dealer would give, or what they would bring at forced sale;¹ or the cost of such property with proper allowance for depreciation, according to the facts or condition, etc., is competent.

evidence of value;² proof of cost price of articles in use for an indefinite period is not sufficient.³

1. *Sun Fire Office v. Ayerst*, 37 Nebr. 184, 55 N. W. Rep. 635. And see *Huston v. State Ins. Co.*, 100 Iowa, 402, 69 N. W. Rep. 674.

2. *Rademacher v. Greenwich Ins. Co.*, 75 Hun, 83, 27 N. Y. Supp. 155; *Cheever v. Scottish Union Ins. Co.*, 86 App. Div. 328, 83 N. Y. Supp. 730; *Glaser v. Home Ins. Co.*, 93 N. Y. Supp. 524.

3. *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341, 33 So. Rep. 361.

RULE 20.

Market Value of Stocks of Merchandise — Evidence.

The market value of stock of goods or merchandise is a proper measure of damage;¹ and the opinion of a merchant who is acquainted with stock of goods destroyed is competent evidence of value;² but not where the witness merely "recollects of being in store several times when he saw a good sized stock of goods there."³

1. *Manchester Ins. Co. v. Feibelman*, 118 Ala. 308, 23 So. Rep. 759, 27 Ins. L. J. 855; *Fowler v. Old North State Ins. Co.*, 74 N. C. 89; *Grubbs v. North Carolina Ins. Co.*, 108 N. C. 472, 18 S. E. Rep. 236.

2. *Burnett v. American Central Ins. Co.*, 68 Mo. App. 343; *Enos v. St. Paul Ins. Co.*, 4 S. D. 639, 57 N. W. Rep. 919, 23 Ins. L. J. 258.

3. *Metzger v. Manchester Assur. Co.*, 102 Mich. 334, 63 N. W. Rep. 650. And see *Teerpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279.

RULE 21.

Loss of Stock of Merchandise, how Estimated.

Where stock of goods or merchandise is destroyed by fire, the amount of the loss may be established by proving the amount of the stock and value at a previous date, and adding thereto the amount of purchases to

date of fire, or cost of manufacturing and delivery, from which is deducted the total amount of sales during the same period less the percentage of profits;¹ books of account and invoices are in most cases the only means of arriving at amount of loss and liability of the insurance company;² the books themselves are the best evidence of their contents.³ The question of percentage of profit is one of fact.⁴

1. *Scottish Union & National Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. Rep. 33, 26 Ins. L. J. 963; *Reade v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665.

2. *Niagara Ins. Co. v. Forehand*, 169 Ill. 629, 48 N. E. Rep. 830.

3. *Dohrman Co. v. Niagara Ins. Co.*, 96 Wis. 38, 71 N. W. Rep. 69, 27 Ins. L. J. 357. And see Rule 23.

4. *Wells Whip Co. v. Farmers' Ins. Co.*, Pa. St. , 58 Atl. Rep. 894.

This rule is given as expressed by the courts in the cases cited, but obviously must not be construed as limiting the elements to those specifically named.

For instance, the amount of an inventory as taken may include value of store fixtures or other items not covered, all of which should be first deducted before amount of purchases is added to date of fire.

To the total amount of sales (less the percentage of profits) should be added the invoice price of all stock or merchandise saved undamaged, and same which has been used by the insured or his family, or removed from the store for sale or disposal elsewhere, before the deduction of amount of sales is made. And after such deduction is made it is proper to consider and make or allow as further deductions, according to the facts and circumstances, a certain percentage for depreciation and for shop or shelf-worn goods, and the value of the merchandise saved in damaged condition as agreed upon or appraised, also discount when it has been allowed for time purchases. Freight also is a proper item for consideration. There may be even other elements which should be considered or proper to be considered, impossible to state or anticipate here.

The following "Statement of Loss" is inserted as a proper model or basis. Credit is given to Mr. W. H. Lowden, of San Francisco, for the form, and is also due to Mr. R. J. Taylor, of New York city, manager of the loss department of the Continental Insurance Company, for clear elaboration of the same.

It is legally correct, and conforms to the principle of above rule:

STATEMENT OF LOSS.

Amount of inventory taken January 2, 1886, at cost, and freight	\$20,000 00
Less value of store fixtures and furniture included in inventory	\$1,100 00
Less also freight on balance (\$18,900.00) included in inventory, ascertained rate at 5 per cent	900 00
	2,000 00
Leaving actual invoice price of inventory..	\$18,000 00
Add cash and credit purchases at invoice price..	15,000 00
Invoice price of merchandise to be accounted for	\$33,000 00

DEDUCTIONS TO ASCERTAIN INVOICE PRICE OF STOCK INJURED.

Total cash and credit sales, as per books	\$16,800 00
Less agreed profits over invoice cost at 20 per cent.....	2,800 00
Leaving invoice price of sales to date of fire	\$14,000 00
Mdse. saved unharmed, at actual invoice price	3,000 00
Mdse. used by assured at invoice price during 5½ months at \$100 per month	550 00
	17,550 00
Giving as a result the invoice price of stock injured (either totally destroyed or damaged) by fire	\$15,450 00

FURTHER DEDUCTIONS AND ADDITIONS TO ASCERTAIN ACTUAL VALUE.

Depreciation on \$15,450.00 at 10 per cent.	\$1,545 00	
Discount for time purchases on \$11,587.50 (three-fourths of the goods having been bought on time) at 2 per cent.	231 75	
Actual appraised (or agreed) cash value of the damaged merchandise.	1,125 00	
		\$2,901 75
Which gives the loss on mdse. at invoice price, less the agreed deductions for depreciation and credit purchases		\$12,548 25
To this add freight on \$15,450.00 (the stock injured by fire) at 5 per cent.		772 50
And the loss to the assured, on a cash basis, is		<u>\$13,320 75</u>

RULE 22.

Inventory of Goods as Evidence.

An inventory of goods totally destroyed is admissible in connection with the testimony of the parties who made it as tending to show the amount and value thereof;¹ when made shortly before the fire, though not made by the insured, but by another party for the purpose of sale to him, it is admissible as a basis of determining the loss;² where there is no *other or better* evidence, same having been destroyed in the fire, an inventory taken six and a half years before the fire, with subsequent purchases and sales may afford proper basis of determining value destroyed.³

1. *West Branch Lumbermen's Exchange v. American Ins. Co.*, 183 Pa. St. 366, 38 Atl. Rep. 1081, 27 Ins. L. J. 305; *Wallach v. Commercial Ins. Co.*, 12 Daly, 387; *Alleghany Ins. Co. v. O'Hanlon*, 1 Walker (Pa.), 359; *Stevens v. Queen*

Ins. Co., 32 N. B. 387; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959.

2. *Scottish Union & National Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. Rep. 180.

3. *German Ins. Co. v. Amsbaugh*, 8 Kans. App. 197, 55 Pac. Rep. 481.

RULE 23.

Estimate of Loss May be Based on Original Bills when no Books and no Inventory.

When assured kept no books, and has no inventory, the estimate or evidence of loss may be based upon original bills representing amounts paid for stock during the time the business has been conducted; evidence that sales during same time averaged a certain amount weekly, that a certain percentage of the proceeds of the sales was profit, and that there remained a stated quantity of the stock after the fire, damaged in a certain amount; such evidence is aided by proof of a general custom among insurance adjusters as to method of ascertaining the loss in such a case;¹ a bill of goods purchased fifteen months prior to the fire may be a proper basis of estimate.²

1. *Sherlock v. German-American Ins. Co.*, 21 App. Div. 18, 47 N. Y. Supp. 315, *affd.*, 162 N. Y. 656, without opinion; *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (U. S.), 527. And see *Williams v. Niagara Ins. Co.*, 50 Iowa, 561.

2. *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Nebr. 351, 53 N. W. Rep. 137, 22 Ins. L. J. 34.

RULE 24.

Inventory and Books Must be Verified as Correct.

Inventory and books of account are competent evidence as to value of stock destroyed only when verified as correct or authenticated;¹ but this does not

necessarily mean by the very persons who made the entries or who had personal knowledge of the facts independent of the books; these elements may affect the weight of the evidence but not its admissibility.²

1. *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. Rep. 855, 26 Ins. L. J. 36; *American Ins. Co. v. First Nat. Bank (Tex.)*, 30 S. W. Rep. 384.

2. *Dohman Co. v. Niagara Ins. Co.*, 96 Wis. 38, 71 N. W. Rep. 69, 27 Ins. L. J. 357.

RULE 25.

Property in Bonded Warehouse.

Where whisky is insured in a bonded warehouse, and is destroyed by fire, before payment of the tax due the United States Government, and under the statute the destruction of the whisky does not release the insured from his liability for the tax due, the insurance company is liable for the value of the whisky, including such tax;¹ and so the actual value of imported goods, including unpaid duty, may be claimed and recovered.²

1. *Queen Ins. Co. v. McCoin*, 105 Ky. 806, 49 S. W. Rep. 800; *Hedger v. Union Ins. Co.*, 17 Fed. Rep. 498.

2. *Wolfe v. Howard Ins. Co.*, 1 Sandf. 124, affd., 7 N. Y. 583.

RULE 26.

Efficiency of Machines Destroyed not Affected by Those not Destroyed.

The value of other machines not destroyed cannot be claimed by the insurance company to show the inefficiency of similar machines destroyed by the fire.

Stockton Combined H. & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. Rep. 565, 27 Ins. L. J. 983.

RULE 27.**Evidence of Value as Limited by Time—Property Having no Market Value.**

While evidence of value must usually be confined to the time of the fire, or reasonably near to it, and specially so where the property consists of perishable articles, or goods having market values subject to fluctuation, there is much property that has no settled market value subject to quotation. Where there is no market value to such property, as for instance, furniture, machinery, wagons, counters, shelving, prescription cases, or other fixtures of a store, it is proper to take as a basis the condition and value some time prior to the fire, if coupled with proof that there has been no deterioration or depreciation.

Johnston v. Farmers' Ins. Co., 106 Mich. 96, 64 N. W. Rep. 5.

RULE 28.**Machine Destroyed Obtainable from Patentee and Only One Source.**

Where a machine destroyed by a fire can be obtained only from a patentee and sole manufacturer, the assured may claim its full value at time of the loss, based on the price which would have to be paid for a new machine, that being the only price at which it could be replaced.

Post Printing Co. v. Insurance Co. of N. A., 189 Pa. St. 300, 42 Atl. Rep. 192. And see *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205.

RULE 29.

Patterns Have no Market Value.

The patterns of a foundry or machine shop have no market value. Their value depends upon their condition, the use to which they can be put, and whether the machines for which they are made are in common use, or whether they are what is known as "dead" patterns.

Michels v. Western Underwriters' Assoc., Mich. , 89 N. W. Rep. 56.

RULE 30.

Loss Payable to Third Party.

When policy insures one party, with loss payable to a third party as interest may appear, the claim as against the insurance company is limited to the loss suffered by the party insured. It is *his* loss which is made payable to the third party and the amount cannot exceed such loss.

Edwards v. Agricultural Ins. Co., 88 Wis. 450, 60 N. W. Rep. 782, 24 Ins. L. J. 290. And see "Parties;" "Mortgagor and Mortgagee."

RULE 31.

Insurance of Tenant.

Where a tenant is insured against loss in payment of rent while the building is untenable on account of fire, his claim to such insurance is not affected or reduced by the fact that the landlord collects insurance held by him against loss of rent, and which is credited or applied by him on account of such rent.

Heller v. Royal Ins. Co., 177 Pa. St. 262, 35 Atl. Rep. 726.

RULE 32.

Reinsurance Payable Pro Rata.

When a reinsurance policy provides that loss if any shall be "payable pro rata" it limits the liability of the company issuing it to such a proportion of the actual loss as is in the ratio of the amount of reinsurance to the amount originally insured, so that if the reinsurance policy is for only half of the original insurance, the company is liable for only one-half the loss;¹ and the word "risk" in a reinsurance contract is construed to apply to the amount insured, and not to an amount as fixed after loss by adjustment.²

1. Home Ins. Co. v. Continental Ins. Co., 62 App. Div. 63, 70 N. Y. Supp. 824.

2. Continental Ins. Co. v. Ætna Ins. Co., 138 N. Y. 16, 33 N. E. Rep. 724, 22 Ins. L. J. 501.

RULE 33.

Cost of Building not Proper Measure of Damage.

The *cost* of a building is not the proper measure of damage for its destruction by fire;¹ but the original cost, and cost of like building, with difference in value between the house burned and the new one by reason of age and use, may be proper elements or subjects of inquiry, in arriving at value at time of the fire;² so the price of lumber and shingles, etc., at date of fire may properly be considered as an element but is not conclusive.³ Knowledge of company, acquired through its soliciting agent in examining the building insured, and taking application for a certain amount may be an element in the evidence.⁴

1. Hilton v. Phoenix Assur. Co., 92 Me. 272, 42 Atl. Rep. 412; Springfield F. & M. Ins. Co. v. Payne, 57 Kans. 291, 46

Pac. Rep. 315, 26 Ins. L. J. 46; *Brinley v. National Ins. Co.*, 11 Metc. (Mass.) 195; *Waynesboro Ins. Co. v. Creaton*, 98 Pa. St. 451; *Guinn v. Phoenix Ins. Co.*, 80 Iowa, 346; *City De Soto v. American Guardian Ins. Co.* (Mo. App.), 74 S. W. Rep. 1.

2. *Holter Lumber Co. v. Firemen's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. Rep. 207, 26 Ins. L. J. 10; *Scott v. Security Ins. Co.*, 98 Iowa, 67, 66 N. W. Rep. 1054, 25 Ins. L. J. 581; *Ætna Ins. Co. v. Johnson*, 74 Ky. 587; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333; *Steinzel v. Pennsylvania Ins. Co.*, 110 La. 1019, 35 So. Rep. 271. And see *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133.

3. *Cummins v. German-American Ins. Co.*, 192 Pa. St. 359, 43 Atl. Rep. 1016.

4. *Scott v. Security Ins. Co.*, 98 Iowa, 67, 66 N. W. Rep. 1054, 25 Ins. L. J. 581.

RULE 34.

When Insurable Interest Insured Extends to Whole Value of Building.

When the insurable interest of the assured insured extends to the whole value of the building or property and the insurance company undertakes to insure the assured against loss by fire, not exceeding the sum specified to the "described property," the loss or damage to be ascertained "according to the actual cash value of the property at the time of the fire," this contract makes the value of the property within the limit the measure of the company's liability. The fact that improvements may have cost the owner nothing, or that if destroyed by fire he may compel another person to replace without expense to him, or that he may recoup his loss by a resort to a contract liability of a third person, in no way affects the liability of the insurance company, in the absence of any exemption in the policy.

Foley v. Manufacturers & Builders' Ins. Co., 152 N. Y. 131, 46 N. E. Rep. 318, 26 Ins. L. J. 598; *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *Foley v. Farragut Ins. Co.*, 71 Hun, 369, 24 N. Y. Supp. 1131; *Tiemann v. Citizens' Ins. Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620; *St. Clara Female Academy v. Northwestern National Ins. Co.*, 98 Wis. 257, 73 N. W. Rep. 767. And see *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Grant v. Elliot Ins. Co.*, 76 Me. 514; *Boston & Salem Ice Co. v. Royal*

Ins. Co., 94 Mass. 381; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543; *Imperial Ins. Co. v. Murray*, 73 Pa. St. 13; *Hope Oil-Mill Compress Co. v. Phoenix Ins. Co.*, 74 Miss. 320, 21 So. Rep. 132, 26 Ins. L. J. 995; *Keefer v. Phoenix Ins. Co.*, 26 App. R. 277, *Osler, J.*, revg. 29 Ont. 394; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. Rep. 13, 24 Ins. L. J. 458; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. Rep. 463, 26 Ins. L. J. 910; *Fox v. Capital Ins. Co.*, 93 Iowa, 7, 61 N. W. Rep. 211, 24 Ins. L. J. 206; *Ulmer v. Phoenix Ins. Co.*, 61 S. C. 459, 39 S. E. Rep. 712.

RULE 35.

When Interest is Limited.

When a party insured has only a life interest in building insured and insures for his sole benefit the proper measure of damage is the value of such interest, and not the actual value of the building itself;¹ and so when the interest insured is limited,² or when policy is in terms on "use and occupancy" the loss is not measured by value of the building.³ But where company with knowledge that insured is life tenant issues policy on full value of the fee, insured may recover full value, and holds excess over value of his life interest in trust for the remainderman.⁴ The interest of a vendee under a conditional contract of sale of personal property is limited to amount of installments paid, there being no liability for payments after destruction of the property;⁵ where liable for loss by fire his interest extends to whole value of the property.⁶

1. *Beekman v. Fulton County Ins. Co.*, 66 App. Div. 72, 73 N. Y. Supp. 110. And see *Sampson v. Grogan*, 21 R. I. 174, 42 Atl. Rep. 712; *Bennett v. Featherstone*, Tenn. , 71 S. W. Rep. 589; *Schaefer v. Anchor Ins. Co.*, Iowa, , 100 N. W. Rep. 857.

2. *Monroe v. Southern Mutual Ins. Co.*, 63 Ga. 669. And see *Protection Ins. Co. v. Hall*, 54 Ky. 411; *Hartford Ins. Co. v. Haas*, 87 Ky. 531; *Van Natta v. Mutual Security Ins. Co.*, 2 Sandf. 490; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 247; *Niblo v. North American Ins. Co.*, 1 Sandf. 551; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. Rep. 1115; *Doyle v. American Ins. Co.*, 181 Mass. 139, 63 N. E. Rep. 394; *Steinmeyer v. Steinmeyer*, S. C. , 42 S. E. Rep. 184.

3. *Michael v. Prussian National Ins. Co.*, 171 N. Y. 25, 63

N. E. Rep. 810, affg. 64 App. Div. 182, 71 N. Y. Supp. 918. And see *Chatfield v. Ætna Ins. Co.*, 71 App. Div. 164, 75 N. Y. Supp. 620.

4. *Welsh v. London Assur. Co.*, 151 Pa. St. 607, 25 Atl. Rep. 142, 22 Ins. L. J. 94. And see *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Sampson v. Grogan*, *supra*; *Convis v. Citizens' Ins. Co.*, Mich. , 86 N. W. Rep. 994. And see *Grant v. Buchanan*, Tex. Civ. App. , 81 S. W. Rep. 820; "Parties to the Insurance Contract."

5. *Tabbut v. American Ins. Co.*, 185 Mass. 419, 70 N. E. Rep. 410.

6. *Ryan v. Agricultural Ins. Co.*, Mass. , 73 N. E. Rep. 849.

RULE 36.

Limitation of Cost of Repairing or Replacing as Applicable to Buildings — Effect of Local Statutes.

The limitation in the standard policy that the liability of the company "shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality" does not refer to cases where the company elects to rebuild, but fixes the measure of liability in all cases, and is not affected by a local statute in force when the standard policy was prescribed, governing the construction, alteration, or removal of buildings.

McCready v. Hartford Ins. Co., 61 App. Div. 583, 70 N. Y. Supp. 778. See Rules 39, 46, and "Exemptions, Exceptions, and Limitations," Rule 16. And see *Hewins v. London Assur. Co.*, 184 Mass. 177, 68 N. E. Rep. 62, where distinction is pointed out under the Massachusetts standard form.

RULE 37.

Cash Value as Applied to a Building.

Actual cash value not exceeding what it would cost to replace means, in case of a building, its gross value or cost of replacing less the value of the portion saved; the latter value to be estimated on the basis of the use of the saved portion, at the same place, and for the same purpose as originally used.

Burkett v. Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. Rep. 848.

RULE 38.**Assured not Limited to Relative Value of Building for Purpose of Removal.**

The insured is entitled to recover the real or actual value of a building destroyed according to the terms of the policy and is not limited to its relative value for purpose of a removal to which he had agreed previous to the fire.

Washington Mills Mfg. Co. v. Commercial Ins. Co., 13 Fed. Rep. 646; Washington Mills Mfg. Co. v. Weymouth Ins. Co., 135 Mass. 503.

RULE 39.**Partial Loss to Building — Effect of Building Laws.**

In ascertaining the loss resulting from the partial burning of a building, the true result is to be reached by taking the cost of reconstruction according to the conditions existing and lawfully imposed at the time fire occurs. If a change in the building laws requires walls of an increased thickness in the rebuilding, the increased cost or expense must be paid by the insurance company, up to the extent of the amount designated in the policy.

Pennsylvania Co. v. Philadelphia Contributorship, 201 Pa. St. 497, 51 Atl. Rep. 351; Hewins v. London Assur. Co., 184 Mass. 177, 68 N. E. Rep. 62. But compare Rule 36.

RULE 40.**Measure of Damage When Building Partially Destroyed.**

Where the loss to insured building is not total but partial, the measure of damage is the difference between the value of the house whole, and damaged,

within the amount of the policy, unless the actual cost of repair is established by the company at a less sum.

German Ins. Co. v. Everett, 18 Tex. Civ. App. 514, 46 S. W. Rep. 95; *Commercial Ins. Co. v. Allen*, 80 Ala. 571; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205.

RULE 41.

Opinions of Witness.

A witness who has never seen buildings destroyed, if competent as an expert on questions of value, may give his opinion as to the value in answer to a hypothetical question or statement of what has been proved as to quality, condition, situation of the property, etc.; but it is not reversible error to have permitted the witness to give his opinion on a description by another witness, where the value was shown by other witnesses, and no evidence to the contrary was introduced;¹ a witness familiar with building in question, if otherwise competent, may give his opinion.² But testimony of experts as to whether a certain quantity of goods could have been burned without destroying the floor is not admissible.³

1. *Chicago & Alton R. R. Co. v. Gleny*, 175 Ill. 238, 51 N. E. Rep. 896, affg. 70 Ill. App. 510. And see *Machen v. Lamar Ins. Co.* (N. Y.), 11 Ins. L. J. 619.

2. *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207, 57 N. E. Rep. 991.

3. *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. Rep. 388, 26 Ins. L. J. 782.

RULE 42.

Effect of Statute Fixing Value and Measure of Damage.

A State statute fixing and determining the value of property insured in event of its destruction by fire is

superior to and supersedes any provision in the policy which would have the effect to nullify the law;¹ and such a statute cannot be claimed to be unconstitutional.² It does not apply to insurance on a building in another State;³ and, unless otherwise stated, has no application to insurance on personal property.⁴

1. *Williams v. Bankers & Merchants' Ins. Co.*, 73 Mo. App. 607; *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125; *Insurance Co. of N. A. v. Bachler*, 44 Nebr. 549, 62 N. W. Rep. 911; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. Rep. 1072; *Reilley v. Franklin Ins. Co.*, 43 Wis. 449; *Oshkosh Gas Light Co. v. Germania Ins. Co.*, 71 Wis. 454, 37 N. W. Rep. 819; *Havens v. Germania Ins. Co.*, 123 Mo. 403, 27 S. W. Rep. 718; *Hartford Ins. Co. v. Bourbon County*, Ky. , 72 S. W. Rep. 739; *Ritchie v. Home Ins. Co.*, Mo. App. , 78 S. W. Rep. 341.

2. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 28 Ins. L. J. 97, affg. 136 Mo. 382, 38 S. W. Rep. 85, 26 Ins. L. J. 67; *Dugger v. Insurance Co.*, 95 Tenn. 245, 32 S. W. Rep. 5.

3. *Gibson v. St. Paul F. & M. Ins. Co.* (U. S. Cir.), 26 Ins. L. J. 94.

4. *Green v. Lancashire Ins. Co.*, 69 Mo. App. 429; *Warshawsky v. Anchor Mutual Ins. Co.*, 98 Iowa, 221, 67 N. W. Rep. 237. And see *Thurber v. Royal Ins. Co.* (Del.), 1 Marv. 251, 40 Atl. Rep. 1111; *City De Soto v. American Guardian Ins. Co.* (Mo. App.), 74 S. W. Rep. 1. A valued policy statute held not to apply to insurance against lightning. *Kattelmann v. Fire Assoc.*, 79 Mo. App. 447.

Where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property is wholly destroyed by fire, the aggregate amount of such insurance must, under the Missouri statute, be taken conclusively to be the true value of the property insured, and the true amount of the loss and measure of damage when so destroyed. The amount written in each policy being consented to by the other companies, they must be held to agree that the aggregate of their several policies is the value of the property. *Havens v. Germania Ins. Co.*, 123 Mo. 403. And see subsequent appeal, 135 Mo. 649, 37 S. W. Rep. 497. And to same effect it has been held in Texas that each policy becomes a liquidated demand, and there can be no apportionment. Conti-

mental Ins. Co. *v.* McCulloch, 15 Tex. Civ. App. 190, 39 S. W. Rep. 374; Western Assur. Co. *v.* Phelps, 77 Miss. 625, 27 So. Rep. 745. And see "Statutory Provisions."

RULE 43.

Statute Fixing Amount of Loss, Makes it a Liquidated Demand.

Where a statute determines the amount of loss and claim, it is in legal effect a liquidated demand, and the insurance company has no right to call upon the assured to make an affidavit in regard to value; a false statement in such an affidavit is immaterial.

Sullivan *v.* Hartford Ins. Co., 89 Tex. 665, 36 S. W. Rep. 73, 25 Ins. L. J. 705, dismissing writ of error, 34 S. W. Rep. 999.

RULE 44.

Company Cannot Evade Statute Fixing Amount of Loss.

It is not competent for an insurance company to evade the operation of a statute fixing or determining value or amount of loss to a building, by agreeing with its owner to call part of it, like machinery, personal property;¹ nor can a building erected on leased land, under a contract that it is to remain lessee's property and is removable at expiration of the lease, be claimed to be personal property, to evade operation of such a statute;² but building and machinery on a mining lease, to be used in the prosecution of mining operations, do not become real property within a valued policy statute.³

1. Havens *v.* Germania Ins. Co., 123 Mo. 403, 27 S. W. Rep. 718, 24 Ins. L. J. 321. And see Murphy *v.* New York Bowery Ins. Co., 62 Mo. App. 495.

2. Orient Ins. Co. *v.* Parlin & O. Co., 14 Tex. Civ. App. 512, 38 S. W. Rep. 60.

3. Millis *v.* Scottish Union & National Ins. Co., 95 Mo. App. 211, 68 S. W. Rep. 1066.

RULE 45.**Burden of Proof of Modification Under Statute Fixing Amount of Loss.**

The burden of establishing any modification under the operation and terms of a statute fixing value and amount of claim in event of destruction of building, like depreciation¹ in value if allowed, or loss or value itself when statute makes amount of policy *prima facie* evidence only,² rests upon the insurance company.

1. Meyer v. Insurance Co. of N. A., 73 Mo. App. 166.

2. Des Moines Ice Co. v. Niagara Ins. Co., 99 Iowa, 193, 68 N. W. Rep. 600, 26 Ins. L. J. 378; Scott v. Security Ins. Co., 98 Iowa, 67, 66 N. W. Rep. 1054, 25 Ins. L. J. 581.

RULE 46.**Effect of City Ordinances as to Repairing or Replacing Buildings in Connection with Statute Fixing Amount of Loss.**

Where there is a valued policy statute, the loss may be made total thereunder by legal operative force of a city ordinance governing repairs or replacing of buildings;¹ and so a loss may be made total in effect by refusal of city authorities to give necessary permission to repair.²

1. Hamburg-Bremen Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. Rep. 337; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. Rep. 409.

2. Brady v. Northwestern Ins. Co., 11 Mich. 425. And see Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. Rep. 472, 24 Ins. L. J. 531; O'Keefe v. Liverpool, L. & G. Ins. Co., 140 Mo. 558, 41 S. W. Rep. 922, 26 Ins. L. J. 888; Hewins v. London Assur. Co., 184 Mass. 177, 68 N. E. Rep. 62. See Rule 36.

RULE 47.**Depreciation When Statute Makes Policy a Valued One.**

The fact that a statute makes a policy a valued one does not prevent of itself such amount being reduced

by depreciation in value from use, decay, or otherwise, as by accident or casualty; such difference in value arising by reason of an intervening cause should be allowed in determining the amount of loss; for this would not be a changing of value as fixed by the parties; the change would arise from a cause supervening, that is, outside of the act of the parties.

Gibson v. Missouri Ins. Co., 82 Mo. App. 515.

The Missouri statute, § 7979 (see Statutory Provisions), makes policy valued. *Siegle v. Phoenix Ins. Co.*, Mo. App., 81 S. W. Rep. 637. In effect as to personal property. *Hanna & Co. v. Orient Ins. Co.*, Mo. App., 82 S. W. Rep. 1115. Though reduction in value of stocks of merchandise or the like may be established. *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. Rep. 342.

RULE 48.

Effect of Fraud When Statute Fixes Amount of Loss — Contract Severable.

Where policy insured house and furniture in separate amounts, and the statute makes the amount of insurance on the former a liquidated demand, fraud in reference to the personal property does not make entire contract void; the policy is not rendered void as to the realty.

Sullivan v. Hartford Ins. Co., 89 Tex. 665, 25 Ins. L. J. 705, 36 S. W. Rep. 73. And see "Construction."

RULE 49.

When Building is a Total Loss.

A building is a "total loss" or "wholly destroyed," within the meaning and operation of a statute fixing the measure of damage or amount of loss or claim in that event, when it loses its identity and specific character as a building, and becomes so far disintegrated that it cannot be properly designated as a building, although some parts of it may remain standing; or some of its materials remain in a more or

less injured condition;¹ or the building has been so injured by the fire that it is unsafe and has to be torn down.² Amount paid for a previous partial loss under the policy should be deducted.³

1. *O'Keefe v. Liverpool, L. & G. Ins. Co.*, 140 Mo. 558, 41 S. W. Rep. 922, 26 Ins. L. J. 888; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. Rep. 1125, 25 Ins. L. J. 848; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. Rep. 767; *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93; *Liverpool, L. & G. Ins. Co. v. Heckman*, 64 Kans. 388, 67 Pac. Rep. 879; *Insurance Co. of N. A. v. Bachler*, 44 Nebr. 549, 62 N. W. Rep. 911, 24 Ins. L. J. 481; *Phoenix Ins. Co. v. Port Clinton Fish Co.*, 14 Ohio C. C. 160; *Oshkosh Packing Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *Hamburg-Bremen Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. Rep. 337; *Havens v. Germania Ins. Co.*, 123 Mo. 403, 27 S. W. Rep. 718; *Murphy v. Insurance Co. (Tex.)*, 54 S. W. Rep. 407; *American Central Ins. Co. v. Murphy (Tex.)*, 61 S. W. Rep. 956.

2. *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. Rep. 509.

3. *Lancashire Ins. Co. v. Bush*, 60 Nebr. 116, 82 N. W. Rep. 313.

RULE 50.

When Building Cannot be Said to be Totally Destroyed — Total Loss — Limitations.

Where the foundation and four walls of the building are left substantially intact and by expending about one-third the worth of the building before the fire it can be restored to its previous condition, it cannot be said to be "totally destroyed," even although the interior and roof are totally destroyed. It is not until the expense of repair exceeds one-half of the value of the building when repaired, that there may be a total loss;¹ it is competent for the insurance company to prove the cost of repairing, and restoring the building to its original usefulness and strength; the proportion

of its material left uninjured and capable of being used in reconstruction, the proportion of the building destroyed, that it could be rebuilt without tearing down; that the greater proportion remained uninjured and intact, and by replacing the damaged portion the building would be as good as new.²

1. *Corbett v. Spring Garden Ins. Co.*, 155 N. Y. 389, 50 N. E. Rep. 282, 27 Ins. L. J. 606, revg. 85 Hun, 250; subsequent appeals after new trial, 40 App. Div. 628, 58 N. Y. Supp. 148, affd., 167 N. Y. 596, without opinion. And see *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93; *Havens v. Germania Ins. Co.*, 123 Mo. 403, 27 S. W. Rep. 718, 24 Ins. L. J. 321, 26 L. R. A. 107.

2. *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 37 S. W. Rep. 1068.

RULE 51.

Total Loss as Applied to Several Buildings, One Entire Plant.

Where there are several buildings constituting one entire plant, and covered by one general description as building and building attached, the question or consideration of a "total loss," must be applied to the structure as a whole.

Northwestern Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. Rep. 265.

RULE 52.

How Total Loss Ascertained — Tests.

A total loss is to be ascertained as of the date of the occurrence, and is determined by the following tests: a building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place

capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building, that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down, and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.

Northwestern Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 65, 88 N. W. Rep. 265, 272; *Thuringia Ins. Co. v. Mallott*, 111 Ky. 917, 64 S. W. Rep. 991, 55 L. R. A. 277; *Providence-Washington Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. Rep. 679; *German Ins. Co. v. Eddy*, 36 Nebr. 461, 54 N. W. Rep. 856, 22 Ins. L. J. 468; *McCready v. Hartford Ins. Co.*, 61 App. Div. 583, 70 N. Y. Supp. 778; *Pennsylvania Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. Rep. 962.

RULE 53.

Photographs as Evidence of Total Loss.

Where it is claimed that there is a total loss under the provisions of a valued policy statute, while photographs of the building after the fire may be admissible

to show its condition, they are not conclusive, as they do not show the walls necessary to be torn down.

Hartford Ins. Co. v. Bourbon County Court, 115 Ky. 109, 72 S. W. Rep. 739.

RULE 54.

Total Loss as Question of Fact or Law.

The question or issue as to "total loss" or destruction of a building is ordinarily one of fact, to be determined by a jury;¹ but not where the undisputed facts establish a case to which Rule 50 is applicable.²

1. Insurance Co. of N. A. v. Bachler, 44 Nebr. 549, 62 N. W. Rep. 911, 24 Ins. L. J. 481; Phoenix Ins. Co. v. Port Clinton Fish Co., 14 Ohio C. C. 160.

2. Corbett v. Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. Rep. 282, 27 Ins. L. J. 606.

TITLE V.

Exemptions, Exceptions, and Limitations.

RULE 1. Liability for explosion as imposed and limited by contract.

2. Loss caused solely by explosion — No preceding fire.

3. Damage by concussion of air caused by explosion in another building.

4. Fire preceding explosion — Question of fact.

5. Meaning of word "fire" as preceding explosion.

6. Explosion caused by lightning.

7. Loss caused by lightning — Rule as imposed by contract.

8. Burden of proof as to cause of damage.

9. Fall of building — Rule as imposed by contract.

10. Fall of building result of fire — Question of fact.

11. Fall not result of fire.

12. Meaning of fall.

13. Meaning of part of building — Construction.

14. Burden of proof as to fall of building.

15. Fall of building caused by explosion within it, followed by fire.

- RULE 16.** Specific exemptions, exceptions, and limitation as to liability imposed by contract.
17. Specific exception not included or covered by general description.
18. When specific insurance by other policies excepted.

RULE 1.

Liability for Explosion as Imposed and Limited by Contract.

The insurance company is not liable for a loss caused by explosion of any kind unless fire ensues, and, in that event, for the damage by fire only.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin,
New Jersey,	

and is substantially the same in the standard form prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire.

The South Dakota form does not contain the provision.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Loss Caused Solely by Explosion — No Preceding Fire.

A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception; an explosion occurring from contact of escaping vapor with a lighted match is also within exception.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

A lighted match is not a "fire" within the meaning of the policy.

Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. Rep. 22, affg. 16 App. D. C. 241.

RULE 3.

Damage by Concussion of Air Caused by Explosion in Another Building.

Damage caused by concussion of air resulting from an explosion in another building is not covered;¹ even though such explosion was caused by a fire.² But the company may be liable for the damage by fire, when fire ensues.³

1. *Cabellero v. Home Ins. Co.*, 15 La. Ann. 217.

2. *Miller v. London & Lancashire Ins. Co.*, 41 Ill. App. 395; *Hustace v. Phoenix Ins. Co.*, 175 N. Y. 292, 67 N. E. Rep. 592, revg. 71 App. Div. 309, 75 N. Y. Supp. 568. And see *Everett v. London Assur. Co.*, 19 C. B. N. S. 126.

3. *John Davis & Co. v. Insurance Co. of N. A.*, 115 Mich. 382, 73 N. W. Rep. 393, 27 Ins. L. J. 184. And see *Hustace v. Phoenix Ins. Co.*, *supra*; *Orient Ins. Co. v. Leonard* (C. C. A.), 120 Fed. Rep. 808, previous appeal 109 Fed. Rep. 286, 48 C. C. A. 369.

RULE 4.

Fire Preceding Explosion — Question of Fact.

When explosions or explosive effects occur after the commencement of a fire, or during its progress, and is an incident of a fire or a result of it, the whole loss is a loss by fire within the meaning and protection of the policy, notwithstanding the destructive effect of the explosions;¹ it is ordinarily a question of fact;² if the explosion precedes the fire, the company is liable

for the damage by fire only, and not for that caused by the explosion.³

1. *Transatlantic Ins. Co. v. Dorsey*, 56 Md. 70; *Heuer v. Northwestern Ins. Co.*, 144 Ill. 393, 33 N. E. Rep. 411, 22 Ins. L. J. 518; *Waters v. Merchants' Ins. Co.*, 11 Pet. (U. S.) 213; *Renshaw v. Firemen's Ins. Co.*, 33 Mo. App. 403; *Scripture v. Lowell Ins. Co.*, 10 Cush. (Mass.) 366; *Cohn v. National Ins. Co.*, 96 Mo. App. 315, 70 S. W. Rep. 259; *La Force v. Williamsburg City Ins. Co.*, 43 Mo. App. 518; *Renshaw v. Missouri State Ins. Co.*, 103 Mo. 606, 5 S. W. Rep. 945; *Washburn v. Insurance Cos.*, 2 Fed. Rep. 304, 633, Fed. Cas. Nos 17,212, 17,215, 17,216; *Insurance Co. v. Foote*, 22 Ohio St. 348; *Briggs v. N. A. Ins. Co.*, 53 N. Y. 446. And see also *Louisville Underwriters v. Durland*, 123 Ind. 544; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; *Smiley v. Citizens' Ins. Co.*, 14 W. Va. 33.

2. *Transatlantic Ins. Co. v. Dorsey*, *supra*.

3. *Cohn v. National Ins. Co.*, *supra*. And see preceding cases.

RULE 5.

Meaning of Word "Fire" as Preceding Explosion.

Where the only fire preceding and causing the explosion is that of a match,¹ or a fuse,² or a lamp,³ or lightning,⁴ or gas jet,⁵ it is not such a *fire* as is contemplated or intended by that term in the policy; but may be otherwise where a burning lamp explodes.⁶

1. *Heuer v. Westchester Ins. Co.*, 44 Ill. App. 429; *Heuer v. Northwestern Ins. Co.*, 144 Ill. 393, 33 N. E. Rep. 411, 22 Ins. L. J. 518.

2. *Phoenix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. Rep. 840, 25 Ins. L. J. 311.

3. *Briggs v. N. A. Ins. Co.*, 53 N. Y. 446.

4. *German Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. Rep. 1097, 26 Ins. L. J. 699.

5. *United F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340.

6. *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580.

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Exception.—In Canada it has been held that fire from a match causing an explosion of gunpowder is a fire within meaning of the policy.

Hobb v. Guardian Ins. Co., 12 Duval, 631.

RULE 6.

Explosion Caused by Lightning.

Where policy insures against loss or damage caused by lightning "subject in all other respects to the terms and conditions of the policy," and powder stored in a building seventy-one feet distant from one insured is struck by lightning, causing an explosion which destroys the latter, the loss is caused by explosion not included in the risk.

German Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. Rep. 1097, 26 Ins. L. J. 699.

RULE 7.

Loss Caused by Lightning — Rule as Imposed by Contract.

The insurance company is not liable for a loss caused by lightning, unless fire ensues, and in that event, for the damage by fire only; but liability for direct damage by lightning may be assumed by specific agreement on the policy.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

The standard form prescribed in :

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain provision as to lightning.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

The valued policy statute of Missouri *held* to have no application to insurance against lightning.

Kattelmann v. Fire Assoc., 79 Mo. App. 447.

RULE 8.

Burden of Proof as to Cause of Damage.

When policy in terms assumes damage by lightning, but excludes that caused by cyclone, or wind or tornado, the burden rests upon the assured to show just what damage was caused by the lightning, exclusive of the wind; both claim and recovery must be confined to the actual direct damage caused by the lightning; if the actual damage by lightning cannot be thus separated and shown, assured cannot claim more than nominal damages;¹ it may be a question for the jury.² It must be established by a preponderance of evidence and will not be submitted to a jury on speculative or conjectural testimony, when equal possibility of another cause.³

1. *Warmcastle v. Scottish Union & National Ins. Co.*, 201 Pa. St. 302, 50 Atl. Rep. 941. And see *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 38 N. E. Rep. 453, 24 Ins. L. J. 73.

2. *Warmcastle v. Scottish Union & National Ins. Co.*, Pa. St. , 59 Atl. Rep. 1105.

3. *Clark v. Franklin Ins. Co.*, 111 Wis. 65, 86 N. W. Rep. 549.

RULE 9.

Fall of Building — Rule as Imposed by Contract.

If a building, or any part thereof, fall, except as the result of fire, all insurance on such building or its contents shall immediately cease.

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This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in:

Maine,
Massachusetts,
Minnesota,

New Hampshire,
South Dakota,

does not contain above provision.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 10.

Fall of Building Result of Fire — Question of Fact.

If the fall is result of a fire, the company is liable; if any evidence of another cause it is a question of fact to be determined by a jury.

Kiesel v. Sun Ins. Co., 88 Fed. Rep. 243, 60 U. S. App. 10, 31 C. C. A. 518; *Leonard v. Orient Ins. Co.*, 109 Fed. Rep. 286, 48 C. C. A. 369, subsequent appeal (C. C. A.), 120 Fed. Rep. 808; *Transatlantic Ins. Co. v. Dorsey*, 56 Md. 70; *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635, 25 Ins. L. J. 81, 30 L. R. A. 346; *Friedman v. Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. Rep. 757; *Nelson v. Traders' Ins. Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220, *affd.*, 181 N. Y. 472, 74 N. E. Rep. 421. See "Direct Loss or Damage by Fire."

RULE 11.

Fall not Result of Fire.

If building falls not as result of fire, and fire breaks out as result of or subsequently to the *fall*, company

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

is not liable;¹ otherwise if the fall was caused by an explosion, and fire ensues.²

1. *Nicholls v. Sun Mutual Ins. Co.*, 71 Miss. 326, 14 So. Rep. 263, 23 Ins. L. J. 633; *Farrell v. Farmers' Ins. Co.*, 66 Mo. App. 153; *Firemen's Fund Ins. Co. v. Congregation Sholom*, 80 Ill. 558; *Liverpool, L. & G. Ins. Co. v. Ende*, 65 Tex. 118; *Huck v. Globe Ins. Co.*, 127 Mass. 306. And see *Nave v. Home Ins. Co.*, 37 Mo. 431.

2. *John Davis & Co. v. Insurance Co. of N. A.*, 115 Mich. 382, 73 N. W. Rep. 393, 27 Ins. L. J. 184. And see Rule 3.

RULE 12.

Meaning of Fall.

Building does not "fall" within the meaning of the rule or policy (see Rule 9) when it is blown from blocks on which resting, and turns over on its side, retaining its identity.

Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231. And see *Firemen's Fund Ins. Co. v. Congregation Sholom*, 80 Ill. 558; *Farrell v. Farmers' Ins. Co.*, 66 Mo. App. 153.

RULE 13.

Meaning of Part of Building—Construction.

The reference in Rule 9 to "any part" of a building does not apply to any minute or fragmentary portion. The phrase should be construed most favorably to the insured as not meaning any fragment or portion, but an integral material or substantial part of the entire building; it means some functional portion of the structure, the falling of which would destroy its distinctive character as such.

Insurance Co. v. Crunk, 91 Tenn. 376, 23 S. W. Rep. 140. And see *Brenner v. Liverpool, L. & G. Ins. Co.*, 51 Cal. 101;

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Security Ins. Co. *v.* Mette, 27 Ill. App. 324; Home Ins. Co. *v.* Tomkies, 30 Tex. Civ. App. 404, 71 S. W. Rep. 812, *affd.*, 71 S. W. Rep. 814; Nelson *v.* Traders' Ins. Co., 181 N. Y. 472, 74 N. E. Rep. 421.

RULE 14.

Burden of Proof as to Fall of Building.

The condition embodied in Rule 9 is a condition subsequent, and the burden of proof rests upon the insurance company to establish that the building fell before the fire;¹ testimony of civil engineer experts may be admissible.² Building may be "shattered" by an explosion and still not "fall" within meaning of the policy.³

1. Western Assur. Co. *v.* Mohlman, 83 Fed. Rep. 811, 51 U. S. App. 577, 28 C. C. A. 157, 27 Ins. L. J. 392; Friedman *v.* Atlas Assur. Co., 133 Mich. 212, 94 N. W. Rep. 757; Transatlantic Ins. Co. *v.* Bamberger (Ky.), 18 Ins. L. J. 625. And see Kiesel *v.* Sun Ins. Co., 88 Fed. Rep. 243; Nichols *v.* Sun Mutual Ins. Co., 71 Miss. 326; Phoenix Ins. Co. *v.* Luce, 60 C. C. A. 655, 123 Fed. Rep. 257.

2. Western Assur. Co. *v.* Mohlman, *supra*. And see Kiesel & Co. *v.* Sun Ins. Co., 88 Fed. Rep. 243, 31 C. C. A. 518, 60 U. S. App. 10.

3. Eppens, Smith & Wieman Co. *v.* Hartford Ins. Co., 99 App. Div. 221, 90 N. Y. Supp. 1035.

RULE 15.

Fall of Building Caused by Explosion Within It Followed by Fire.

Rule 9 as to fall of building does not include a case of fall of a building by an explosion within it, and of a fire immediately ensuing, as liability in such a case is specifically assumed under the explosion clause or exception.

Dows *v.* Faneuil Hall Ins. Co., 127 Mass. 346. And see Rules 1-6.

RULE 16.

Specific Exemptions, Exceptions, and Limitations as to Liability Imposed by Contract.

The company is not liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war,

or commotion, or military, or usurped power, or by order of any civil authority, or by theft; it is not liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor unless liability is specifically assumed, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculptures, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

By the standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

the provision is that: "Bills of exchange, notes, accounts, evidences and securities, of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture, and curiosi-

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

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ties are not included, unless specially mentioned," and the company is liable for "all loss or damage by fire originating from any cause, except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

Whether caused by a riot or not a question of fact. *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247. And see *Michigan F. & M. Ins. Co. v. Whitelaw*, 25 Ohio Cir. 197.

The exemption of loss caused by order of civil authority is not a warranty under the California Code. *Conner v. Manchester Assur. Co.*, 130 Fed. Rep. 743, C. C. A. . The phrase "or by theft" refers to theft committed during the fire, or when goods are exposed as a consequence of the fire. *Splancher v. Fire Assoc.*, N. J. L. , 60 Atl. Rep. 232. When a standard form is prescribed by statute and inconsistent provisions prohibited, an additional exception inconsistent with the terms of the policy cannot be added. *Wausau Telephone Co. v. United Fireman's Ins. Co.*, Wis. , 101 N. W. Rep. 1100.

RULE 17.

Specific Exception not Included or Covered by General Description.

The printed exception as to "patterns" is operative notwithstanding policy by written description covers "stock and all other articles usual in a merchant tailor's establishment."

Johnston v. Niagara Ins. Co., 118 N. C. 643, 24 S. E. Rep. 424. And see "Description," Rule 31, and "Construction."

That general description does not cover specific exemptions, see also *Banyer v. Albany Ins. Co.*, 85 App. Div. 122, 83 N. Y. Supp. 65.

RULE 18.

When Specific Insurance by Other Policies Excepted.

When a policy contains a clause excepting from its liability goods or property as to which the insured shall have specific insurance, it makes no difference whether a separate policy is issued for each risk, or one policy for all risks, each of which is separately identified by the invoice value or by that value plus a certain percentage; such insurance is as much specific insurance as if a separate policy had been issued on each entry or the subject-matter of each invoice.

Peabody v. Liverpool, L. & G. Ins. Co., 171 Mass. 114, 50 N. E. Rep. 526. And see *London Assur. Co. v. Paterson*, 106 Ga. 538, 32 S. E. Rep. 650, 28 Ins. L. J. 385.

TITLE VI.

Appraisal.

- RULE** 1. Appraisal as imposed by contract.
2. Rights and duties of both parties — Must be exercised within reasonable time.
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4. Not necessary to admit liability — Effect of denial of liability.
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12. Effect of selection of same appraiser by several companies.
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18. Motive in demand immaterial.
19. Demand cannot be split.
20. Authority of officer of company.
21. Authority of local agent.
22. Insured presumed to know contents of appraisal agreement — Capacity to contract not restricted.
23. Appraisal limited to determination of amount.
24. When loss payable to a mortgagee — Partners.
25. Policy of the law as to place of adjustment and selection of appraisers and umpire.
26. Exact distance not prescribed.
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30. Duty of both parties to act in good faith — Negotiation for compromise.
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 32. Umpire refusing to act, if company delays new appraisal insured may make his assent conditional.
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 34. Effect of failure to agree upon umpire when no question of fault or good faith.
 35. When appraisal fails without fault or misconduct of insurance company.
 36. Must be some evidence of bad faith on part of the company to relieve insured.
 37. When appraisal fails without fault of either party.
 38. Effect of appraisers' disagreement and refusal to proceed and failure to agree upon new appraisers — Element of bad faith.
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 41. Meaning of disinterested — Appraiser not an agent — Concealment — Parties responsible for his neglect or misconduct.
 42. Appraisers are not partisans — Must be impartial — Are not representatives of either party.
 43. Company must name appraiser who will act promptly — Effect of prevention or delay.
 44. Previous employment by insurance company — Concealment or misrepresentation.
 45. Facts as to previous employment should not be concealed.
 46. Appraiser named by insured a public adjuster, partner, or agent — Question of fact.
 47. Responsibility of parties for neglect or misconduct of appraisers.
 48. Appraisers must not delay on account of advice of insured's counsel — Not obliged to follow unsigned directions.
 49. Insured bound by his inventory — Effect of fraud by company's adjuster.

RULE 50. Insured entitled to notice and opportunity of being heard.

51. Appraisers must not proceed secretly or independently — If evidence taken, insured must have opportunity of being present.
52. Duties of appraisers substantially same as arbitrators.
53. Appraisal not an ordinary arbitration.
54. Effect of an appraisal required in a standard form of policy.
55. Appraisers not limited to kind or quality of evidence — Experts.
56. Distinction as to evidence when property wholly destroyed or damaged.
57. Appraisers' decision as to application of the description in policy to property in question conclusive.
58. Effect of improper proposal by the company's appraiser.
59. Appraisers must follow agreed submitted schedule.
60. Proceedings not invalid for want of oath by appraisers.
61. Appraisers must follow limitations in policy as to amount of loss or damage.
62. Allowance must be made for depreciation.
63. Umpire may be selected after commencement of appraisal.
64. When umpire has authority to act.
65. Duty of the umpire.
66. Appraisers have no right to make an additional award.
67. Award binding — Does not depend upon acceptance, tender, or payment.
68. Award final and conclusive — When rendered void.
69. Courts will not interfere with award — Strong proof required — When set aside.
70. Award cannot exceed amount of policy.
71. Award invalid when made by umpire and one of the appraisers, when other withdraws before completion of appraisal.
72. Award binding only to extent of subject-matter submitted.
73. Concealment of material evidence by insured.
74. Award not set aside on evidence of other independent appraisers.
75. Company cannot retain advantage of award obtained by fraud of adjuster on claim that he had no authority to act.

- RULE 76.** Meaning of misconduct by appraisers.
- 77. Duty of parties when award objected to on ground of fraud or misconduct.
 - 78. Award void for uncertainty.
 - 79. Award not limited by two-thirds clause in policy.
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 - 81. Recovery of interest when award set aside.
 - 82. Remedy of insured when award claimed to be void.
 - 83. Remedy when distinction between common-law and equity practice prevails — Burden of proof — No cause of action on award itself.
 - 84. Competency of evidence of appraiser.
 - 85. Remedy of insurance companies in equity to enforce award.
 - 86. Insured may obtain relief from effect of limitation clause by cross-bill in same suit.
 - 87. Waiver of appraisal.
 - 88. Insured may by notice create evidence of waiver.
 - 89. Denial of liability as waiver.
 - 90. Denial of liability when coupled with demand for appraisal.
 - 91. Omission or refusal to join in appraisal does not estop company from insisting on competent evidence — *Ex parte* appraisal.
 - 92. No waiver when demanded in proper time.
 - 93. When policy provides for written request.
 - 94. Failure to demand as evidence of waiver.
 - 95. Appraisal may be made evidence of waiver.
 - 96. No waiver by appraisal under standard form — Effect of other acts in connection — Waiver of options or time — Appraisal agreement.
 - 97. Rule of waiver as imposed by contract.
 - 98. Effect of statute fixing amount of loss.
 - 99. Appraisal under statute fixing amount of loss.

RULE 1.

Appraisal as Imposed by Contract.

In the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, the insured and the com-

pany each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expense of the appraisal and umpire.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

The standard form of policy prescribed in Michigan provides as above except the clause "shall be *prima facie* evidence of the amount of such loss" is substituted for "shall determine the amount of such loss."

In Wisconsin the provision reads as follows:

"In the event of disagreement in the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, who shall be residents of this State unless otherwise agreed by the parties hereto; the insured and this company each selecting one, within thirty-five days after the mailing of proof of loss to said company, as herein stated, and in case either party fails to select an appraiser within such time the other appraiser and the umpire selected, as herein provided, may act as a board of appraisers and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent and disinterested umpire, provided that

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the Circuit Court of the county wherein the loss occurs may appoint such an umpire, upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within thirty days after proof of loss has been mailed to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right of an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire."

In Maine, Massachusetts,
the provision reads as follows:

“In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.”

In Minnesota, same as in Maine and Massachusetts, except the clause is inserted "except in case of total loss on buildings."

In New Hampshire the provision reads as follows:

“In case difference of opinion shall arise as to the amount of any loss under this policy other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the Supreme Court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their

award in writing, after proper notice and hearing, shall be final and binding on the parties."

The South Dakota form provides: "Except in cases of loss where the amount thereof is fixed, as hereinbefore provided, in the event of disagreement as to amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss stating separately sound value and damage, and, failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Rights and Duties of Both Parties — Must be Exercised Within Reasonable Time.

It is not the duty of the assured to initiate an appraisal, when the condition in the policy is precedent to a recovery only when required by the company. Either party has the right to require an appraisal when there is a disagreement as to the amount of the loss. But that right is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case. Neither party can so use the right as to take undue advantage of the other, but both must act in good faith. It is not a weapon of attack, but of defense, and a party who intends to use it must give reasonable notice of such intention, for its omission to do so will be evidence of waiver, more or less conclusive according to circumstances. For instance, if the company knows that the assured desires a prompt appraisal or an adjustment, so that the property may not suffer further injury before being sold or disposed of, it cannot postpone its demand for an appraisal until after the assured, misled by its act, has been placed in a position where one is impossible.

Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. Rep. 392. And see *Hamilton v. Phoenix Ins. Co.* 61 Fed. Rep. 379, 9 C. C. A. 530, 23 Ins. L. J. 561; *Connecticut Ins. Co. v. Hamilton*, 59 Fed. Rep. 258, 8 C. C. A. 114; *McManus v. Western Assur. Co.*, 43 App. Div. 550, *affd.*, 167 N. Y. 602, without opinion.

RULE 3.

Condition Precedent.

Where an appraisal has been properly demanded an appraisal or award as to the amount of loss or damage becomes a condition precedent to right to sue, and action cannot be maintained in absence of award, unless the condition is waived or in some way dispensed with; assured has no right at his mere option or volition to revoke the appraisal clause or submission under it.

Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. Rep. 422; *Palatine Ins. Co. v. Morton Scott Co.*, 106 Tenn. 558, 61 S. W. Rep. 787; *Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. Rep. 447, 25 Ins. L. J. 874; *Silver v. Western Assur. Co.*, 164 N. Y. 381, 58 N. E. Rep. 284; *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73, 49 Atl. Rep. 738; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258; *Guerin v. Manchester Assur. Co.*, 29 Can. S. C. 139; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 50 Atl. Rep. 282; *Raymond v. Farmers' Ins. Co.*, 114 Mich. 386, 72 N. W. Rep. 254; *Caledonian Ins. Co. v. Gilmour* (1893), L. R. App. Cas. 85; *Dee & Sons v. Key City Ins. Co.*, 104 Iowa, 167, 73 N. W. Rep. 594; *Vincent v. German Ins. Co.*, 120 Iowa, 272, 94 N. W. Rep. 458; *Lamson Consolidated Stove Co. v. Prudential Ins. Co.*, 171 Mass. 433, 50 N. E. Rep. 943, 28 Ins. L. J. 70; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S. W. Rep. 630; *Old Sancelito Land Co. v. Commercial Union Ins. Co.*, 66 Cal. 253; *Wolfe v. Liverpool, L. & G. Ins. Co.*, 50 N. J. L. 453, 14 Atl. Rep. 561; *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242; *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. Rep. 252; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. Rep. 297; *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. Rep. 932; *Eichner v. Liverpool, L. & G. Ins. Co. (C. P.)*, 9 N. Y. Supp. 954; *Murphy v. North B.*

& M. Ins. Co., 61 Mo. App. 323; *Morley v. Liverpool, L. & G. Ins. Co.*, 85 Mich. 210, 48 N. W. Rep. 502; *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116; *Kersey v. Phoenix Ins. Co.*, Mich. , 97 N. W. Rep. 57; *Continental Ins. Co. v. Vollandigham*, Ky. , 76 S. W. Rep. 22; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757; *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63; *Providence-Washington Ins. Co. v. Wolf*, Ind. App. , 72 N. E. Rep. 606.

As a condition precedent under the Massachusetts standard form, see *Lamson Consolidated Stove Co. v. Prudential Ins. Co.*, 171 Mass. 433, 50 N. E. Rep. 943, 28 Ins. L. J. 70, and Rule 1.

Exceptions.—A clause in a policy for appraisal is too indefinite to be enforced when it does not provide for the number of the appraisers nor mode of their selection;¹ or when the policy does not contain a further provision that action cannot be maintained or loss become due and payable until after an award;² in Nebraska any appraisal clause which does not provide for submission to a particular person or to a particular tribunal, but to persons to be mutually chosen, is revocable by either party.³ It is revocable in Pennsylvania,⁴ and in New Hampshire.⁵

1. *Greiss v. State Investment Ins. Co.*, 98 Cal. 241, 33 Pac. Rep. 195, 22 Ins. L. J. 629; *Ætna Ins. Co. v. McLead*, 57 Kans. 95, 45 Pac. Rep. 73, 25 Ins. L. J. 669; *Case v. Manufacturers' Ins. Co.*, 82 Cal. 263, 21 Pac. Rep. 843.

2. *Mutual Ins. Co. v. Alvord*, 61 Fed. Rep. 752, 23 Ins. L. J. 301.

3. *Home Ins. Co. v. Kennedy*, 47 Nebr. 138, 66 N. W. Rep. 278; *Phoenix Ins. Co. v. Zlottky*, 66 Nebr. 584, 92 N. W. Rep. 736; *Hartford Ins. Co. v. Hon*, 66 Nebr. 555, 92 N. W. Rep. 746; *Insurance Co. of N. A. v. Bachler*, 44 Nebr. 549, 62 N. W. Rep. 911, 24 Ins. L. J. 481.

4. *Yost v. Dwelling-House Ins. Co.*, 179 Pa. St. 381, 35 Atl. Rep. 517, 26 Ins. L. J. 716; *Needy v. German-American Ins. Co.*, 197 Pa. St. 460, 47 Atl. Rep. 739.

5. *Franklin v. New Hampshire Ins. Co.*, 70 N. H. 251, 47 Atl. Rep. 91.

RULE 4.

Not Necessary to Admit Liability — Effect of Denial of Liability.

It is not necessary for the insurance company to admit liability before the appraisal clause becomes operative;¹ though denial of liability may operate as a waiver of appraisal.²

1. *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. Rep. 936, 28 Ins. L. J. 349. And see *Willoughby v. St. Paul German Ins. Co.*, 68 Minn. 373.

2. See Rule 89.

In Pennsylvania, where the appraisal clause is held inoperative as a condition precedent to right to sue, and to be revocable (*Needy v. German-American Ins. Co.*, 197 Pa. St. 460, 47 Atl. Rep. 739) it has been held that limited effect may be given to it when liability is admitted, and the only question is one of amount. *Mentz v. American Ins. Co.*, 79 Pa. St. 478; *Yost v. Dwelling-House Ins. Co.*, 179 Pa. St. 381, 35 Atl. Rep. 517.

In Tennessee it has only lately been held that a demand for an appraisal involved an admission of liability for some amount and operated as a waiver. *North German Ins. Co. v. Morton Scott Robertson Co.*, 108 Tenn. 384, 67 S. W. Rep. 816. But reading of entire opinion shows that the expression of the court was founded upon the reasoning that the insurance company cannot at same time deny all liability, and demand an appraisal, which is perfectly consistent with Rule 89, and that was really what was decided by the case cited — *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041.

Neither the Pennsylvania nor Tennessee cases referred to appear to have considered or decided the effect or legal operative force of the specific provision, inserted in the standard form, since the decision in the *Mentz* case, that "the company shall not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to an appraisal," nor of the clause usually inserted in appraisal agreements that same shall be without prejudice, etc. Whether either of these or similar provisions were in the policies or record in the Tennessee cases does not appear in the reports. Thus neither the Pennsylvania nor Tennessee cases would appear to be clear or satisfactory authority for any proposition or rule to contrary of that stated above in the text.

RULE 5.

Effort Must be Made to Arrive at Amount of Loss—Must be Actual Disagreement.

It is incumbent upon the insurance company to make some effort to arrive at amount of the loss by agreement with the assured before the appraisal clause can be invoked as a defense. There must be an actual disagreement as to amount between the assured and the company before the appraisal clause becomes operative; such disagreement will not be assumed where the company fails or neglects to take any steps to ascertain the loss;¹ but may be assumed when both parties have signed an appraisal agreement.²

1. *Manchester Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. Rep. 723; *Hartford Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305, 46 S. W. Rep. 851; *Fletcher v. German-American Ins. Co.*, 79 Minn. 338, 82 N. W. Rep. 647; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *Boyle v. Hamburg-Bremen Ins. Co.*, 169 Pa. St. 349, 32 Atl. Rep. 553, 24 Ins. L. J. 699; *Moyer v. Sun Ins. Co.*, 176 Pa. St. 579, 35 Atl. Rep. 221; *Capital Ins. Co. v. Wallace*, 50 Kans. 453, 31 Pac. Rep. 1070, 22 Ins. L. J. 397; *Walker v. German Ins. Co.*, 51 Kans. 725, 33 Pac. Rep. 597; *Hanover Ins. Co. v. Harper*, 77 Ill. App. 453; *American Ins. Co. v. Stewart (Tex.)*, 38 S. W. Rep. 395; *Citizens' Ins. Co. v. Bland (Ky.)*, 39 S. W. Rep. 825, 26 Ins. L. J. 615, 40 S. W. Rep. 670; *McNees v. Southern Ins. Co.*, 61 Mo. App. 335; *Liverpool, L. & G. Ins. Co. v. Hall*, 1 Kans. App. 18, 41 Pac. Rep. 165; *Hooker v. Phoenix Ins. Co.*, 69 Mo. App. 141; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869; *Rosenwald v. Phoenix Ins. Co.*, 50 Hun, 172; *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28, 10 S. E. Rep. 1057; *Continental Ins. Co. v. Vallandigham, Ky.*, 76 S. W. Rep. 22; *British-American Ins. Co. v. Darbagh*, 128 Fed. Rep. 890, C. C. A. ; *Kelly v. Liverpool, L. & G. Ins. Co.*, Minn. , 102 N. W. Rep. 380.
2. *Kersey v. Phoenix Ins. Co.*, Mich. , 97 N. W. Rep. 57.

RULE 6.

Disagreement Must Exist as to Amount of Loss.

A disagreement between the assured and the insurance company upon a matter distinct and separate

from amount of the loss, as for instance, as to liability, and not as affecting the apportionment or amount of the loss, is not a disagreement as to amount of the loss;¹ and so where the assured refuses an adjuster's offer in compromise, and then the latter withdraws his offer with notice that the company insists upon all the terms of the policy intending to terminate all negotiations for a settlement, there exists no longer a difference as to the amount of the loss, and appraisal clause is inoperative.²

1. *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. Rep. 38, 26 Ins. L. J. 913; *Hogadone v. Grange Mutual Ins. Co.*, 133 Mich. 339, 94 N. W. Rep. 1045.

2. *Dautel v. Pennsylvania Ins. Co.*, 65 Mo. App. 44.

RULE 7.

Insured Estopped by His Request for Appraisal.

When the assured has requested an appraisal, he cannot be heard afterward to claim that the condition was inoperative because there had been no effort to agree upon an adjustment.

Brock v. Dwelling-House Ins. Co., 102 Mich. 583, 61 N. W. Rep. 67, 24 Ins. L. J. 464; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757.

RULE 8.

Must be Demand for Appraisal — Effect of Omission to Make it.

The appraisal clause does not become operative as a condition precedent until the company makes a demand for an appraisal;¹ and this by construction notwithstanding the omission of former words used "shall upon request of either party be submitted,"

etc.,² but the omission is immaterial, as failure to make the demand becomes evidence of waiver.³

1. *Lesure Lumber Co. v. Mutual Ins. Co.*, 101 Iowa, 514, 70 N. W. Rep. 761; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 80 N. W. Rep. 309; *National Home B. & L. Assoc. v. Dwelling-House Ins. Co.*, 106 Mich. 236, 64 N. W. Rep. 21; *Chainless Cycle Co. v. Security Ins. Co.*, 169 N. Y. 304, 62 N. E. Rep. 392; *Davis v. Anchor Mutual Ins. Co.*, 96 Iowa, 70, 64 N. W. Rep. 687, 25 Ins. L. J. 299; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. Rep. 566, 27 Ins. L. J. 517; *Bishop v. Norwich Union Ins. Co.*, 25 N. S. 492; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *Liverpool, L. & G. Ins. Co. v. Hall*, 1 Kans. App. 18, 41 Pac. Rep. 65; *Citizens' Ins. Co. v. Bland (Ky.)*, 39 S. W. Rep. 825, 26 Ins. L. J. 615, 40 S. W. Rep. 670; *Kahnweiler v. Phoenix Ins. Co.*, 67 Fed. Rep. 483, 14 C. C. A. 485, 32 U. S. App. 230; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Capital Ins. Co. v. Wallace*, 48 Kans. 400, 29 Pac. Rep. 755; *Tilley v. Connecticut Ins. Co.*, 86 Va. 811, 11 S. E. Rep. 120.

2. *Lesure Lumber Co. v. Mutual Ins. Co.*, *supra*; *Chainless Cycle Co. v. Security Ins. Co.*, *supra*.

3. See Rules 13, 87, and 97. A subsequent clause in the standard form providing for payment of the loss in sixty days after furnishing of proof, etc., "including an award by appraisers when appraisal has been *required*," assumes a previous requirement. As construed in *Lesure Lumber Co. v. Mutual Ins. Co.*, *supra*, p. 523. (And see Rule 2.) This construction is, however, opposed by *McNees v. Insurance Co.*, 69 Mo. App. 232; *Murphy v. N. B. & M. Co.*, 61 Mo. App. 323. And see *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 50 Atl. Rep. 282.

The best and perhaps the most correct summary of the matter would be to say that the condition is operative in event of disagreement as to amount of loss without request, but may be and is waived where there is no request, or the absence of request becomes evidence of waiver. *Kahnweiler v. Phoenix Ins. Co.*, *supra*; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 332, 36 N. E. Rep. 408; *Chainless Cycle Co. v. Security Ins. Co.*, *supra*. In *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63, it seems to be held that after the company has demanded an appraisal it need not take the initiative in the selection of appraisers.

RULE 9.

Demand Must be in Clear and Explicit Terms.

The demand for an appraisal should be in clear and explicit terms; it cannot be inferred from a general expression in a letter or communication to the assured that the loss would not be payable until determined in manner stipulated in the policy.

Grand Rapids Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. W. Rep. 545.

RULE 10.

Agreement for Appraisal Must Follow Terms of the Policy.

A written agreement of appraisal must follow strictly the terms of the policy; if there is a departure from such terms it in effect abrogates the appraisal clause or else it operates as a waiver of it;¹ and the award if pleaded as made under the policy is no defense to an action on the policy;² the insurance company has no right to insist upon execution of a written contract for appraisal, containing provisions not stated in the policy;³ nor can the insured insist on inserting other provisions or conditions.⁴

1. *Broadway Ins. Co. v. Doying*, 55 N. J. L. 569, 27 Atl. Rep. 927, 23 Ins. L. J. 394; *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. Rep. 436, rehearing denied, 16 Wash. 239, 47 Pac. Rep. 485; *Walker v. German Ins. Co.*, 51 Kans. 725, 33 Pac. Rep. 597; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 83 N. W. Rep. 820; *Harrison v. Hartford Ins. Co.*, 59 Fed. Rep. 732, 23 Ins. L. J. 161; *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577; *Westenhaver v. German-American Ins. Co.*, 113 Iowa, 726, 84 N. W. Rep. 717; *Summerfield v. North B. & M. Ins. Co.*, 62 Fed. Rep. 249, 24 Ins. L. J. 442; *Adams v. New York Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. Rep. 1149; *Schouweiler v. Merchants' Mut. Ins. Co.*, 11 S. D. 401, 78 N. W. Rep. 356,

28 Ins. L. J. 541. And see *Remington Paper Co. v. London Assur. Co.*, 12 App. Div. 218, 43 N. Y. Supp. 431.

2. *Adams v. New York Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. Rep. 1149. See Rule 29.

3. *Walker v. German Ins. Co.*, *supra*. See Rules 22, 29, 67.

4. *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. Rep. 945.

RULE 11.

When Number of Policies all of Same Form — When Different.

Where the policies of all the companies which join in an agreement for an appraisal are in one standard form, it cannot be claimed as an unauthorized appraisal or outside of the policy, and in effect a common-law arbitration;¹ where not all of standard form, the demand and agreement should be several or separate.² The employment of an appraiser by several companies is presumed to be joint and a payment of his compensation by one is for benefit of all.³

1. *Wicking v. Citizens' Mut. Ins. Co.*, 118 Mich. 640, 77 N. W. Rep. 275, 28 Ins. L. J. 220, distinguishing *Connecticut Ins. Co. v. Hamilton*, 59 Fed. Rep. 258, 16 U. S. App. 366, 23 Ins. L. J. 241, 8 C. C. A. 114. And see *Hamilton v. Phoenix Ins. Co.*, 61 Fed. Rep. 379, 9 C. C. A. 530, 22 U. S. App. 164, 23 Ins. L. J. 561.

2. See preceding cases in United States court; *Palatine Ins. Co. v. Morton Scott Co.*, 106 Tenn. 558, 61 S. W. Rep. 787; *North German Ins. Co. v. Morton Scott Co.*, 108 Tenn. 384, 67 S. W. Rep. 816.

3. *Muench v. Globe Ins. Co.*, 8 Misc. 328, 28 N. Y. Supp. 569.

RULE 12.

Effect of Selection of Same Appraiser by Several Companies.

The mere fact that several insurance companies all select the same appraiser does not tend to show that

the appraisal is any other than the one required by the terms of the policies.

Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. Rep. 717.

RULE 13.

Demand for Appraisal Should be Made Promptly on Disagreement—Waiver.

The insurance company, upon disagreement as to amount of the loss, should make a demand for an appraisal promptly within reasonable time, otherwise its delay to make such demand may be evidence of waiver;¹ in connection with other facts, and not a conclusive waiver as matter of law.²

1. *Davis v. American Central Ins. Co.*, 7 App. Div. 488, 40 N. Y. Supp. 248, *affd.* without opinion, 158 N. Y. 688; *Chainless Cycle Co. v. Security Ins. Co.*, 169 N. Y. 304, 62 N. E. Rep. 392; *Hamilton v. Phoenix Ins. Co.*, 61 Fed. Rep. 379, 9 C. C. A. 530, 22 U. S. App. 164, 23 Ins. L. J. 561; *Grand Rapids Ins. Co. v. Finn*, 60 Ohio St. 513, 54 N. E. Rep. 545.

2. *Smith v. California Ins. Co.*, 87 Me. 190, 32 Atl. Rep. 872, previous appeal, 85 Me. 348. And see Rule 87.

RULE 14.

Delay by Insured in Making Demand.

If the insurance company, knowing of failure to agree on amount of loss, does not demand the appraisal, it cannot complain of assured's delay in making such demand or offer; but where delay is so great as to render an appraisal impossible, impracticable, or prejudicial to the insurance company, the assured can derive no benefit from such offer.

McNess v. Southern Ins. Co., 69 Mo. App. 232; *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226. And see *Continental Ins. Co. v. Wilson*, 45 Kans. 250, 25 Pac. Rep. 629.

Exception.—In Minnesota assured may offer or demand an appraisal even after his complaint has been dismissed upon the trial for having previously refused to comply with demand of the insurance company; but the court is careful to say that rule would be otherwise where, for instance, property had been damaged, and company had been deprived of right to take it at appraised value.

Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. Rep. 1005, rehearing denied, 79 N. W. Rep. 1026. And see also *Kahnweiler v. Phoenix Ins. Co.*, 67 Fed. Rep. 483, 14 C. C. A. 485, 32 U. S. App. 230.

RULE 15.

Duty of Insured as to Keeping Damaged Goods.

It is not the duty of the insured to keep damaged goods, in the absence of all request or attention from the insurance company, for a period of thirty days after furnishing of proofs in order to await a possible request for appraisal, where most of the goods were destroyed, and the damaged goods are of little comparative value, and when kept for fourteen days after receipt of notice of the loss, and depreciating in value all the time;¹ it is the duty of insured to keep the damaged property when he is notified by the insurance company in reasonable time of its intention to examine same for purpose of determining valuation, damage, or appraisal.²

1. *Davis v. American Central Ins. Co.*, 7 App. Div. 488, 40 N. Y. Supp. 248, *affd.* without opinion, 158 N. Y. 688. And see *Chainless Cycle Co. v. Security Ins. Co.*, 52 App. Div. 104, 64 N. Y. Supp. 1060, *affd.*, 169 N. Y. 304, 62 N. E. Rep. 392; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. Rep. 1005.

2. *Astrich v. German-American Ins. Co.*, 131 Fed. Rep. 13, C. C. A. , *affg.* 128 Fed. Rep. 477. And see *Providence-Washington Ins. Co. v. Wolf*, Ind. App. , 72 N. E. Rep. 606. Reasonable time is a question of fact rather than law, depending upon the circumstances of the particular case. In *Phoenix Assur. Co. v. Stinson*, Tex. Civ. App. , 79 S. W. Rep. 866, it was held that three days' delay or omission by the company to express its desire or intention was evidence of waiver,

excusing the disposition of damaged goods by the insured. This is an extreme case, and cannot be said to establish a rule as to time.

RULE 16.

Demand by Registered Letter — Effect of Mailing.

A registered letter which the insured refuses to receive, containing a demand for an appraisal, must be regarded as duly transmitted and received;¹ mailing a letter demanding an appraisal raises a presumption of its receipt, but positive evidence that it was not received rebuts the presumption;² the question then becomes one of fact for determination by a jury.³

1. American Central Ins. Co. v. Simpson, 43 Ill. App. 98.

2. American Central Ins. Co. v. Heath (Tex. Civ. App.), 69 S. W. Rep. 235.

3. Rauch v. Michigan Millers' Ins. Co., 131 Mich. 281, 91 N. W. Rep. 160.

RULE 17.

Demand for Appraisal Must Include Existing Losses Caused by Successive Fires.

Where there have been successive fires within a short time under the same policy, a demand for an appraisal by the company, made after the second fire, cannot be limited to the first fire. The company has no right to demand an appraisal except as to both fires and losses.

Mechanics' Ins. Co. v. Hodge, 149 Ill. 298, 37 N. E. Rep. 51, affg. 46 Ill. App. 479.

RULE 18.

Motive in Demand Immaterial.

Where the right to have an appraisal is fixed by the terms of the contract, it is immaterial what motive prompted the demand for performance.

Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

RULE 19.

Demand Cannot be Split.

A demand for appraisal cannot be split, but must cover and include at one time all that is proper a

required by the terms of the policy to be submitted to the appraisers, unless otherwise consent is given to a partial appraisal.

Palatine Ins. Co. v. Morton-Scott Co., 106 Tenn. 558, 61 S. W. Rep. 787.

RULE 20.

Authority of Officer of Company.

Where the president of a corporation in charge of its business is absent, an officer in temporary charge binds him and it in an agreement of appraisal.

Remington Paper Co. v. London Assur. Co., 12 App. Div. 218, 43 N. Y. Supp. 431.

RULE 21.

Authority of Local Agent.

A local agent who acts with the company's adjuster after a loss may be clothed with apparent authority to represent the company in the adjustment and incidentally to receive in its behalf a demand from the insured for an appraisal; at least his authority becomes a question of fact for the determination of a jury;¹ but ordinarily where policy in terms provides that "only such persons as shall have the commission of the company shall be considered its agent," no agent can make an effective demand for an appraisal who does not hold such commission;² a local agent, as such, has no authority in connection with appraisal.³

1. *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. Rep. 408. And see *Milwaukee Mechanics' Ins. Co. v. Schallman*, 90 Ill. App. 280, *affd.*, 188 Ill. 213, 59 N. E. Rep. 12.

2. *Mechanics' Ins. Co. v. Hodge*, 46 Ill. App. 479, *affd.*, 149 Ill. 298, 37 N. E. Rep. 51.
 3. *Turner v. Quincy Ins. Co.*, 109 Mass. 568.
- As to authority of adjuster, see "Adjuster."

RULE 22.

Insured Presumed to Know Contents of Appraisal Agreement — Capacity to Contract not Restricted.

In the absence of fraud or mistake, assured is conclusively presumed to know the contents of an appraisal agreement made after a fire, and the capacity of the parties to make such a contract is not restricted to the terms of a standard policy, because upon the occurrence of a loss by fire the relation of the parties is changed from that of insurer and insured to that of debtor and creditor;¹ it cannot be varied by parol evidence of verbal agreements, nor by expressions of opinion.²

1. *Montgomery v. American Central Ins. Co.*, 108 Wis. 146, 84 N. W. Rep. 175; *Michels v. Western Underwriters' Assoc.*, 129 Mich. 417, 89 N. W. Rep. 56. And see *Vincent v. German Ins. Co.*, 120 Iowa, 272, 94 N. W. Rep. 458. And see Rules 29, 67.

2. *Rutter and Hendrix v. Hanover Ins. Co.*, Ala., 35 So. Rep. 33; *Townsend v. Greenwich Ins. Co.*, 86 App. Div. 323, 83 N. Y. Supp. 909, *affd.*, 178 N. Y. 634, without opinion.

RULE 23.

Appraisal Limited to Determination of Amount.

An appraisal and an award, unless otherwise specifically agreed, only operate as determining the amount of loss; the question of liability of the insurance company remains unaffected;¹ appraisers are limited to property submitted in schedule or list and have no authority to determine what articles are covered by the policy.²

1. *Smith v. Herd* (Ky.), 60 S. W. Rep. 841; *Townsend v. Greenwich Ins. Co.*, 86 App. Div. 323, 83 N. Y. Supp. 909, *affd.*, 178 N. Y. 634, without opinion.

2. *American Ins. Co. v. Bell* (Tex. Civ. App.), 75 S. W. Rep. 319. And see Rules 49 and 59.

RULE 24.

When Loss Payable to a Mortgagee — Partners.

The insured has the right and the power to enter into an appraisal, according to the terms of the policy, without notice to the mortgagee to whom the loss is payable and without his approval;¹ but such appraisal does not always bind the mortgagee, whose rights, if any, are fixed at time of loss and cannot be diminished or destroyed by the insured's subsequent action,² unless he participated in the appraisal;³ or had notice;⁴ submission to appraisal by one partner binds the others.⁵

1. *Chandos v. American Ins. Co.*, 84 Wis. 184, 54 N. W. Rep. 390, 22 Ins. L. J. 425.

2. *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 So. Rep. 414; *Morris v. German-American Ins. Co.*, 14 Ky. L. Rep. 859; *Bergman v. Commercial Union Assur. Co.*, 92 Ky. 494, 18 S. W. Rep. 122.

3. *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. Rep. 431, 25 Ins. L. J. 525.

4. *Bergman v. Commercial Assur. Co.*, 92 Ky. 494, 18 S. W. Rep. 122.

5. *Brink v. New Amsterdam Ins. Co.*, 5 Robt. 104.

See "Mortgagor and Mortgagee."

RULE 25.

Policy of the Law as to Place of Adjustment and Selection of Appraisers and Umpire.

The policy of the law is that losses be adjusted where they occur and that appraisers and the umpire be selected in the vicinity of place where fire occurs. An insurance company or its appraiser cannot insist upon the selection of an appraiser or umpire at a distant point from where property was destroyed,

when the assured's appraiser offers the names of a number of proper persons to act in that capacity who reside in the vicinity. The conduct of the company's appraiser in refusing to agree upon an umpire in such a case, or in insisting upon the selection of one at a distance, amounts to a refusal to proceed, and the appraisal clause no longer bars an action.¹ Insured is entitled to have his goods appraised at their value in the market where destroyed.²

1. *Brock v. Dwelling-House Ins. Co.*, 102 Mich. 583, 61 N. W. Rep. 67, 24 Ins. L. J. 464; *Braddy v. New York Bowery Ins. Co.*, 115 N. C. 354, 20 S. E. Rep. 477; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. Rep. 422; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 83 N. W. Rep. 820; *Niagara Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. Rep. 1102, affg. 49 Ill. App. 388; *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. Rep. 207; *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S. W. Rep. 485. And see *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577.

2. *Chapman v. Rockford Ins. Co.*, *supra*.

RULE 26.

Exact Distance not Prescribed.

While neither the policy nor the law undertakes to fix the exact distance from place of fire within which the appraisers and umpire must be selected, it has been held that the company cannot insist upon the appointment of persons living 200 miles distant from the place where the property was destroyed;¹ and the insured cannot be required to submit to appraisal outside his own State.²

1. *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. Rep. 207; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. Rep. 422.

2. *American Central Ins. Co. v. Simpson*, 43 Ill. App. 98.

RULE 27.

Appraisal Clause Operative Only on Damaged Property.

The appraisal clause operates only on damaged property and not on that totally destroyed;¹ but may include or cover a dispute as to whether or not there was a total destruction;² or a dispute as to whether certain property is embraced or covered by the policy; if the company refuses to proceed with appraisal and to include such disputed property, it operates as a waiver of the appraisal condition in the policy;³ but this rule does not prevent an appraisal agreement to include all or other property.⁴

1. *Liverpool, L. & G. Ins. Co. v. Colgin*, 34 S. W. Rep. 291; *Fire Assoc. v. Colgin* (Tex.), 33 S. W. Rep. 1004; *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Rosenwald v. Phoenix Ins. Co.*, 50 Hun, 172, 3 N. Y. Supp. 215. And see *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. Rep. 183, 24 Ins. L. J. 789.

2. *Yendel v. Western Assur. Co.*, 21 Misc. 348, 47 N. Y. Supp. 141; *Williamson v. Liverpool, L. & G. Ins. Co.* (C. C. A.), 122 Fed. Rep. 59. But see and compare *Williams v. Hartford Ins. Co.*, 54 Cal. 442.

3. *Dee & Sons Co. v. Key City Ins. Co.*, 104 Iowa, 167, 73 N. W. Rep. 594.

4. See Rule 29.

Exception.—In Minnesota the court seems to recognize the appraisal of property wholly destroyed.

Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. Rep. 1005, rehearing denied, 79 N. W. Rep. 1026; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. Rep. 252. And so in Iowa. *Adams v. N. Y. Bowery Ins. Co.*, 85 Iowa, 6, 11, 51 N. W. Rep. 1149. And so in Tennessee. *Palatine Ins. Co. v. Morton-Scott Co.*, 106 Tenn. 558, 61 S. W. Rep. 787. And see *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, but note that the policy in this case in terms required that the award should fix the amount of the "claim." See Rule 28.

The conflict between this Rule and Rule 28 following is explainable in different construction by the courts. It might be noted that the *Rosenwald* case was decided under the old forms. The language of the policy was changed by the standard

form; but from later decisions in the Appellate Division and Miscellaneous Reports, which must have involved a construction of the standard form, it would still seem to be construed substantially the same, the Rosenwald case being recognized as precedent and authority, although the change in the language does not appear to be specially considered in the opinions. The entire language of the standard form is not perfectly clear and distinct, and might be argued to be open to either construction. (See Construction.)

The intent to make the clause applicable to a case where property is wholly destroyed as well as when damaged would seem to be evidenced by the language in a previous part of the standard form which provides that "said ascertainment or estimate (i. e. of the *loss or damage*) shall be made by the insured and this company, *or, if they differ, then by appraisers as hereinafter provided.*" See lines 2, 3, 109, form, page 475.

Whether this clause supplies sufficient evidence of intent, the absence of which was made the foundation of the reasoning of the opinion in the Rosenwald case (see 50 Hun, 174), or whether the words "*as hereinafter provided*" qualify or limit the meaning and operative force of the language, is the material question. The case in Tennessee, cited under Rule 28, would seem to adopt the former view in construction.

Had the clause (see Rule 1) been made to read "* * * the appraisers together shall then estimate and appraise the entire loss both as to property wholly destroyed and damaged, stating separately sound value and loss or damage * * *," there would have been no room for construction.

The subject would appear to be involved in some confusion and will probably so remain until a clear and decisive rule is made by the Court of Appeals.

In practice the matter is ordinarily disposed of by voluntary acquiescence or construction by the parties themselves, as expressed in a written agreement for appraisal made after the loss, it being usually in the interest of the insured as well as the company to have the entire loss disposed of, if possible and expedient, in the one appraisal.

RULE 28.

Demand for Exclusive Appraisal of Saved and Damaged Property not Warranted.

A demand for the exclusive appraisal of saved and damaged property is not warranted, when the policy

is broad enough in its terms to require an ascertainment of the entire loss, or the amount of the loss, in the event of disagreement as to such amount;¹ the standard forms authorize the appraisal of destroyed property.²

1. *Palatine Ins. Co. v. Morton-Scott Co.*, 106 Tenn. 558, 61 S. W. Rep. 787; *Williamson v. Liverpool, L. & G. Ins. Co.* (C. C. A.), 122 Fed. Rep. 59. And see Rule 27, "Exception."

2. *Stout v. Phoenix Assur. Co.*, N. J. Eq. , 56 Atl. Rep. 691.

RULE 29.

If Appraisal Includes Property Wholly Consumed, Award Conclusive.

Where the agreement for appraisal made after the fire as to the amount of loss includes the ascertainment of loss and damage to goods wholly consumed, as well as those which were partially consumed or damaged, and the award affirmatively shows that the appraisers did pass upon and ascertain the loss and damage to the goods consumed as well as to those damaged, such award is conclusive upon the theory of a voluntary arbitration;¹ and the award is not binding unless they do act on destroyed property as well as damaged.²

1. *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, 21 So. Rep. 958.

2. *Rutter and Hendrix v. Hanover Ins. Co.*, Ala. , 35 So. Rep. 33.

RULE 30.

Duty of Both Parties to Act in Good Faith — Negotiations for Compromise.

Both the insured and the insurance company are under duty to act in good faith to have loss ascertained as provided;¹ but if either in bad faith prevent it or unreasonably delay it by refusing to proceed, or by insisting upon selection of improper appraisers, or by undue interference after their selection in the appointment of an umpire or otherwise, the other party is absolved from further obligation to have appraisal; if such fault be attributable to the assured it

is a defense to action on the policy, but if to the company the lack of an award will not defeat a recovery;² pendency of negotiations for a compromise does not excuse failure to proceed with an appraisal.³ The question of fault or good faith is one for the jury.⁴

1. *Silver v. Western Assur. Co.*, 164 N. Y. 381, 58 N. E. Rep. 284; *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73, 49 Atl. Rep. 738; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

2. *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. Rep. 936; *Hall v. Western Assur. Co.*, 133 Ala. 637, 32 So. Rep. 257; *Yendel v. Western Assur. Co.*, 21 Misc. 348, 47 N. Y. Supp. 141; *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 80 N. W. Rep. 309; *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226; *Reade v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665. And see *Uhrig v. Williamsburg City Ins. Co.*, 101 N. Y. 362, 4 N. E. Rep. 745, affg. 31 Hun, 98; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844, affg. 56 Hun, 642, 9 N. Y. Supp. 350; *Niagara Ins. Co. v. Bishop*, 49 Ill. App. 388; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. Rep. 13; *Continental Ins. Co. v. Wilson*, 45 Kans. 250, 25 Pac. Rep. 629; *Braddy v. N. Y. Bowery Ins. Co.*, 115 N. C. 354, 20 S. E. Rep. 477; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. Rep. 207; *Powers Dry Goods Co. v. Imperial Ins. Co.*, 48 Minn. 380, 51 N. W. Rep. 123; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041; *Connecticut Ins. Co. v. Cohen*, Md. , 55 Atl. Rep. 675; *Continental Ins. Co. v. Vallandigham*, Ky. , 76 S. W. Rep. 22; *British-American Ins. Co. v. Darragh*, 128 Fed. Rep. 890, 63 C. C. A. 426; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757; *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S. W. Rep. 485. And cases cited under Rule 3.

3. *Powers Dry Goods Co. v. Imperial Ins. Co.*, *supra*.

4. *Fowble v. Phoenix Ins. Co.*, *supra*; *Carp v. Queen Ins. Co.*, *supra*.

RULE 31.

Good Faith in Attempted Selection of Umpire Question of Fact.

When appraisers have proceeded with an appraisal but have failed to agree upon an umpire as result of negotiations with that object, court is not bound, as

matter of law, to hold that assured has not complied with condition of the policy in reference to an appraisal and to dismiss the complaint upon that ground. Defendant's right, under such circumstances, is to have the insured's good faith in endeavoring to comply with the condition submitted to the jury as a question of fact.

Rademacher v. Greenwich Ins. Co., 75 Hun, 83, 27 N. Y. Supp. 155. And see *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577; *Davenport v. Long Island Ins. Co.*, 10 Daly, 535; *Connecticut Ins. Co. v. Cohen*, Md. , 55 Atl. Rep. 675.

RULE 32.

**Umpire Refusing to Act, if Company Delays New Appraisal,
Insured May Make His Assent Conditional.**

Where an appraisal fails through refusal of the umpire to act and the insurance company delays in attempting a new appraisal, such new appraisal is so far voluntary on assured's part that he may make it conditional; as, for instance, that the company should pay the award when made, and should waive the sixty days' period prescribed before payment could be demanded; if such a reasonable condition be not accepted by the insurance company the appraisal clause is no bar to the action.

Michel v. American Cent. Ins. Co., 17 App. Div. 87, 44 N. Y. Supp. 832.

RULE 33.

Duty of Parties When One of the Appraisers Refuses to Act.

A refusal to act or proceed by one of the appraisers does not justify the abandonment of the appraisal when other party is proceeding in good faith; it is the duty of the assured to at once name, or offer to name, a new appraiser, or as may be required by the

circumstances, to show his readiness to proceed, if he wishes to be represented; otherwise it may be proper for the other appraiser and the umpire to proceed where there has been disagreement.

American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. Rep. 738. But compare Rules 64 and 71.

RULE 34.

Effect of Failure to Agree upon Umpire When no Question of Fault or Good Faith.

When appraisers acting in good faith have failed to agree upon an umpire through *no fault* of either of the parties to the appraisal, the assured is not thereby relieved from complying with the condition as to an appraisal; it is his duty to propose the selection of other appraisers, or he must agree to appointment of new appraisers and proceed with the appraisal if demanded by the insurance company;¹ bad faith will not be inferred from mere refusal to agree upon an umpire.²

1. *Westenhaver v. German-American Ins. Co.*, 113 Iowa, 726, 84 N. W. Rep. 717; *Vernon Ins. Co. v. Maitlen*, 158 Ind. 393, 63 N. E. Rep. 755; *Kersey v. Phoenix Ins. Co.*, Mich. , 97 N. W. Rep. 57; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757. And see *Spurrier v. La Cloche* (1902), App. Cas. 446 (Eng. P. C.).

2. *Kersey v. Phoenix Ins. Co.*, *supra*.

RULE 35.

When Appraisal Fails without Fault or Misconduct of Insurance Company.

Where an appraisal fails without the fault or misconduct of the insurance company, the condition still remains in force as precedent to right of action, and it is the duty of insured to seek a new determination of the amount of loss in the manner provided for by the

contract, unless there is some sufficient reason why such a determination has become unnecessary or impossible.

Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. Rep. 282; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. Rep. 855, 26 Ins. L. J. 36; *Kersey v. Phoenix Ins. Co.*, Mich., 97 N. W. Rep. 57.

RULE 36.

Must be Some Evidence of Bad Faith on Part of the Company to Believe Insured.

Both parties are equally bound to act in good faith in accomplishing the object of an appraisal, and when the assured, beyond the appointment of an appraiser, has taken no steps to render it effective and there is no evidence of bad faith on part of the insurance company, the assured is not relieved from compliance with the condition.

Silver v. Western Assur. Co., 164 N. Y. 381, 58 N. E. Rep. 284, revg. 33 App. Div. 450, 54 N. Y. Supp. 27; *Williams v. German Ins. Co.*, 90 App. Div. 413, 86 N. Y. Supp. 98. And see *Connecticut Ins. Co. v. Cohen*, Md., 55 Atl. Rep. 675.

RULE 37.

When Appraisal Fails without Fault of Either Party.

Provision for appraisal, while valid and binding, is collateral to the contract of insurance; and if appraisal fails without fault of either party to the contract, they are relegated to their legal rights, independent of such provision.

Western Assur. Co. v. Hall, 120 Ala. 547, 24 So. Rep. 936, 28 Ins. L. J. 349. And see *Pretzfelder v. Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. Rep. 302; *Braddy v. New York Bowery Ins. Co.*, 115 N. C. 354, 20 S. E. Rep. 477; *Howard Insurance Co. v. Hocking*, 115 Pa. St. 416; *Fritz v. British-American Ins. Co.*, 208 Pa. St. 268, 57 Atl. Rep. 573; *Western Assur. Co. v. Decker*, 98 Fed. Rep. 381, 39 C. C. A. 383. Compare previous rules.

RULE 38.

Effect of Appraisers' Disagreement and Refusal to Proceed and Failure to Agree upon New Appraisers — Element of Bad Faith.

Where appraisers disagree and refuse to go on and finally break up without making an award and there is a failure to agree upon new appraisers, the parties are relegated to their legal rights, and action can be maintained upon the policy without the appraisal. Where appraisers, or a majority of them, fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his appraiser) is not compelled to submit to another appraisal and another delay, but may forthwith bring his action.

Pretzfelder v. Merchants' Ins. Co., 116 N. C. 491, 496, 21 S. E. Rep. 302, 123 N. C. 164, 31 S. E. Rep. 470, 28 Ins. L. J. 169, following *Insurance Co. v. Hocking*, 115 Pa. St. 416. And see *Fritz v. British-American Ins. Co.*, 208 Pa. St. 268, 57 Atl. Rep. 573; *Perry v. Greenwich Ins. Co.*, N. C. , 49 S. E. Rep. 889. Compare previous rules.

RULE 39.

Waiver of Right to New Appraisal — Fault of the Company.

Where an award fails without fault on part of the insurance company, the right, if any, to a new appraisal is waived where it is not asked for, and where the company insists upon maintaining proceedings under first appraisal;¹ and so wherever the failure to enter upon a new appraisal is the fault of the company.²

1. *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. Rep. 855, 26 Ins. L. J. 36; *American Ins. Co. v. Bell* (Tex. Civ. App.), 75 S. W. Rep. 319.

2. *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 241, 47 Pac. Rep. 436, 439, rehearing denied. 16 Wash. 239, 47 Pac. Rep. 485; *Reade v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665.

RULE 40.

Appraisers Act in Quasi-Judicial Capacity — Should be Free from Bias or Partiality — Burden of Proof.

Appraisers act in a quasi-judicial capacity and should be free from all bias and partiality in favor of either party;¹ assured is not bound to submit to an appraisal by interested or otherwise incompetent persons; but interest, partiality, or other incompetency will not be assumed; the burden of establishing it rests upon the assured who makes objection upon that ground;² but if either party acts or proceeds with an appraisal, knowing that the appraiser is objectionable, an award when made becomes binding and conclusive.³

1. *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *N. Y. Mutual Savings Assoc. v. Manchester Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075.

2. *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. Rep. 936, 28 Ins. L. J. 349.

3. *Indiana Ins. Co. v. Boehm*, 88 Ind. 578; *Produce Refrigerator Co. v. Norwich Union Ins. Assoc.*, Minn., 97 N. W. Rep. 875.

RULE 41.

Meaning of Disinterested — Appraiser not an Agent — Concealment — Parties Responsible for His Neglect or Misconduct.

The word "disinterested" is not confined to lack of pecuniary interest in the question of loss. A competent and disinterested appraiser means one who is not biased or prejudiced. He is in no sense the agent of the party appointing or nominating him, and he remains at all times under the duty to be fair and unprejudiced. When a false statement is made by the company's agent or adjuster in regard to the attitude of a proposed appraiser for the purpose of inducing

consent to his appointment, which is in that way obtained, and when concealment is practiced in regard to his real attitude to the company nominating him the fact of his habitual employment by it and other insurance companies in same capacity being concealed, when in fact he is not disinterested, good ground is shown for setting aside an appraisal which is grossly below the actual loss sustained, although it has been agreed to by the appraiser selected by the assured;¹ an appraiser so far stands for the party appointing him, that the latter is responsible for his neglect or misconduct,² but is not biased or prejudiced simply because he is indorser on assured's note.³ Whether competent and disinterested a question of fact.⁴

1. *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. Rep. 1055, 22 Ins. L. J. 161; *Hall v. Western Assur. Co.*, 133 Ala. 637, 32 So. Rep. 257; *Kiernan v. Dutchess County Ins. Co.*, 150 N. Y. 190, 44 N. E. Rep. 698; *Kaiser v. Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344; *Royal Ins. Co. v. Parlin Co.*, 12 Tex. Civ. App. 572, 34 S. W. Rep. 401. And see *Glover v. Rochester German Ins. Co.*, 11 Wash. 143; *Niagara Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. Rep. 1102; *Produce Refrigerator Co. v. Norwich Union Assur. Soc.*, Minn. , 97 N. W. Rep. 875.

2. *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844; *Austin v. Niagara Ins. Co.*, 16 App. Div. 86, 45 N. Y. Supp. 106.

3. *Bullman v. North B. & M. Ins. Co.*, 159 Mass. 118, 34 N. E. Rep. 169. And see Rule 47.

4. *National Ins. Co. v. O'Bryan*, Ark. , 87 S. W. Rep. 129.

RULE 42.

Appraisers Are not Partisans — Must be Impartial — Are not Representatives of Either Party.

In the selection of appraisers it is not contemplated that they shall represent either party to the controversy or be a partisan in the cause of either, nor is an appraiser expected to sustain the views or further the

interests of the party who may have named him. And this is true not only with respect to estimating the amount of the loss, but also with reference to the selection of an umpire. They are to act in a quasi-judicial capacity and as a court selected by the parties free from all partiality and bias in favor of either party, so as to do equal justice between them. They must be impartial and nonpartisan.

Hall *v.* Western Assur. Co., 133 Ala. 637, 32 So. Rep. 257; Goodwin *v.* Merchants' Ins. Co., 118 Iowa, 601, 92 N. W. Rep. 894. But compare with Rule 53.

RULE 43.

Company Must Name Appraiser Who Will Act Promptly — Effect of Prevention or Delay.

The insurance company is bound to choose an appraiser who will act with reasonable promptness in naming an umpire, and on his failure to do so to replace him with another; any intentional prevention or unreasonable delay operates to relieve the assured, if he is without fault, from compliance with the appraisal clause.

Reade *v.* State Ins. Co., 103 Iowa, 307, 72 N. W. Rep. 665; Harrison *v.* Hartford Ins. Co., 112 Iowa, 77, 83 N. W. Rep. 820.

RULE 44.

Previous Employment by Insurance Company — Concealment or Misrepresentation.

That an appraiser is friendly to the insurance companies and had been frequently employed by them in same capacity does not of itself show partiality, espe-

cially where it appears that assured's appraiser was friendly to and employed by him and agreed with the companies' appraiser, so that services of an umpire were not needed or called for;¹ it should be made to appear that he had formed a preconceived opinion or that he was biased or prejudiced;² or that there was an element of concealment, misrepresentation, or fraud in obtaining his selection.³ A preconceived opinion as an expert derived from personal inspection does not of itself disqualify an appraiser, though may be proper to be considered by a jury.⁴

1. *Remington Paper Co. v. London Assur. Co.*, 12 App. Div. 218, 43 N. Y. Supp. 431.

2. *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 972; *Continental Ins. Co. v. Vollandigham*, Ky. , 76 S. W. Rep. 22; *Produce Refrigerator Co. v. Norwich Union Ins. Assoc.*, Minn. , 97 N. W. Rep. 875.

3. *Cheney v. Martin*, 127 Mass. 304. See Rule 41.

4. *National Ins. Co. v. O'Bryan*, Ark. , 87 S. W. Rep. 129.

RULE 45.

Facts as to Previous Employment Should not be Concealed.

Previous acting in same capacity does not of itself disqualify an appraiser; there must be actual bias, but the facts or previous relations should not be concealed.

Cheney v. Martin, 127 Mass. 304.

RULE 46.

Appraiser Named by Insured a Public Adjuster, Partner, or Agent — Question of Fact.

The fact that an appraiser named by assured was at one time a public adjuster, or had been the partner of an agent of assured, does not as matter of law render him incompetent; the question whether he was competent and disinterested is one of fact for a jury.

Meyerson v. Hartford Ins. Co., 17 Misc. 121, 39 N. Y. Supp. 329, affg. 16 Misc. 286, 38 N. Y. Supp. 112, reargument denied, 39 N. Y. Supp. 1128.

RULE 47.

Responsibility of Parties for Neglect or Misconduct of Appraisers.

When appraisers are appointed they stand respectively for the parties appointing them. If either improperly neglects his duty the party appointing him is responsible for such neglect. If either insists upon an unreasonable requirement which has the effect to defeat an appraisal his principal is responsible therefor. If either refused to go on with the work or acted in such bad faith as to prevent the accomplishment of the appraisal within a reasonable time the principal of the other appraiser is absolved from further compliance with the condition in the policy. In such a case it must be said that the appraisal is not pending, but has been abandoned.

Niagara Ins. Co. v. Bishop, 49 Ill. App. 388; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757; *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527, 81 S. W. Rep. 485. And see *Ætna Ins. Co. v. Davis* (Ky.), 55 S. W. Rep. 705.

RULE 48.

Appraisers Must not Delay on Account of Advice of Insured's Counsel — Not Obligated to Follow Unsigned Directions.

Appraisers are not justified in delaying their work by a difference of opinion resulting from advice of assured's counsel; they can disregard such advice and proceed with their work, leaving law questions to be determined by the proper tribunal. Such delay is not chargeable to the assured;¹ and they are not obliged to follow detailed directions indorsed upon the sub-

mission agreement, but unsigned, their failure to do so does not affect validity of the award.²

1. *Austin v. Niagara Ins. Co.*, 16 App. Div. 86, 45 N. Y. Supp. 106.

2. *Enright v. Montauk Ins. Co.*, 15 N. Y. Supp. 893, 61 Hun, 625 (memo., not reported).

RULE 49.

Insured Bound by His Inventory — Effect of Fraud by Company's Adjuster.

The insured is bound by an inventory furnished and certified by him and upon which appraisers based their award. He cannot subsequently complain that articles or items were omitted from the inventory and appraisal,¹ but otherwise when the omissions were induced by the fraudulent act or representation of the company's adjuster.²

1. *Kentucky Chair Co. v. Rochester German Ins. Co.* (Ky.), 49 S. W. Rep. 780. And see *Chandos v. American Ins. Co.*, 84 Wis. 184.

2. *Herndon v. Imperial Ins. Co.*, 110 N. C. 279, 14 S. E. Rep. 742. And see *Hong Sling v. National Ins. Co.*, 7 Utah, 441; *Morley v. Liverpool, L. & G. Ins. Co.*, 85 Mich. 210.

RULE 50.

Insured Entitled to Notice and Opportunity of Being Heard.

The insured is entitled if he desires and does not waive it to have notice or knowledge of the meeting of appraisers and an opportunity to draw their attention to the items of his loss and make representations and explanations to them concerning the nature thereof and thus insure a consideration of his entire claim and guard against omissions and misconduct. Their fail-

are or refusal to listen to such statement may be an element of evidence in establishing misconduct or that the appraisers were not unbiased, unprejudiced, and disinterested, requiring setting aside of the award;¹ unless so desired, insured not entitled to notice of meetings of the appraisers, but is entitled to such notice when an appraiser and umpire act together.²

1. *Kaiser v. Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, *affd.*, 172 N. Y. 663, without opinion; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kans. 291, 46 Pac. Rep. 315, 26 Ins. L. J. 46; *Citizens' Ins. Co. v. Hamilton*, 48 Ill. App. 593. And see *Vincent v. German Ins. Co.*, Iowa, , 94 N. W. Rep. 458; *Stout v. Phoenix Assur. Co.*, N. J. Eq. , 56 Atl. Rep. 691; *Sterling v. German-American Ins. Co.*, N. J. Eq. , 60 Atl. Rep. 200; *Redner v. New York Ins. Co.*, Minn. , 99 N. W. Rep. 886. See Rule 56.

2. *Schmitt v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767; *Townsend v. Greenwich Ins. Co.*, 86 App. Div. 323, 83 N. Y. Supp. 909, *affd.*, 178 N. Y. 634, without opinion. And see Rules 51, 54, 64.

RULE 51.

Appraisers Must not Proceed Secretly or Independently—If Evidence Taken, Insured Must Have Opportunity of Being Present.

Appraisers cannot proceed by secret or independent investigation, nor can they proceed together in taking evidence without affording assured or his counsel an opportunity of being present,¹ but an individual investigation by an appraiser, in good faith, in absence of others, does not necessarily render an award void.²

1. *Christianson v. Norwich Union Ins. Soc.*, 84 Minn. 526, 88 N. W. Rep. 16; *Phoenix Ins. Co. v. Moore (Tex.)*, 46 S. W. Rep. 1131; *Citizens' Ins. Co. v. Hamilton*, 48 Ill. App. 593.

2. *Farrell v. German-American Ins. Co.* 175 Mass. 340, 56 N. E. Rep. 572. See Rules 50, 54, 56.

RULE 52.

Duties of Appraisers Substantially Same as Arbitrators.

The appraisal under the standard form while not strictly the same proceeding as an arbitration and an award at common law or under a statute, and the decided cases under latter are not always applicable;¹ yet appraisers occupy the position of arbitrators and their duties are substantially the same.²

1. *Strome v. London Assur. Co.*, 20 App. Div. 571, 47 N. Y. Supp. 481, *affd.*, 162 N. Y. 627, without opinion. And see *De Groot v. Fulton Ins. Co.*, 4 Robt. 504; *Hall v. Norwalk Ins. Co.*, 57 Conn. 105; *Zallee v. Laclede Ins. Co.*, 44 Mo. 530; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. Rep. 297; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. Rep. 1055; *Enright v. Montauk Ins. Co.*, 15 N. Y. Supp. 893.

2. *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 531, 35 Atl. Rep. 13, 25 Ins. L. J. 791; *Kaiser v. Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344.

In England the proceeding seems to be subject to the provisions of the Arbitration Act. *Baker v. Yorkshire Ins. Co.* (1892), 1 Q. B. 144.

RULE 53.

Appraisal not an Ordinary Arbitration.

An appraisal is not an ordinary arbitration where the parties hear witnesses and appear by counsel and act upon sworn evidence only. It is strictly an appraisal and ascertainment in a particular manner of the amount of the loss, made by two or three parties, as the case may be, in which they act upon their own judgment, with such information as they can obtain in an informal way, and in which the appraiser chosen by each party is supposed and expected in a restricted

sense to represent the party appointing him and within reasonable limits to see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser.

American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. Rep. 738; *Schmitt v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767. Compare with Rule 42. And see Rules 50, 51, and 56.

RULE 54.

Effect of an Appraisal Required in a Standard Form of Policy.

When a State prescribes in a standard form of fire insurance contract and requires an appraisal, such appraisers constitute a quasi court, subject to the principles governing common-law arbitration. Such a board should sit in a body and receive evidence offered by the respective parties, submitting the same if required to usual tests of cross-examination. While the individual members are prohibited from privately collecting evidence from different sources, a reasonable latitude is allowed them in the examination of the premises and remnants of goods for the purpose of better understanding and weighing the evidence on the principal question before them, viz., what is the just damage to the property involved? But while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, such a board is not selected for the purpose of seeking evidence secretly and determining the amount of loss by reason of such personal knowledge. The appraisers must constitute a body of disinterested men, whose business it is to proceed in a

judicial and impartial manner to ascertain the facts in controversy.

Christianson v. Norwich Union Ins. Soc., 84 Minn. 526, 88 N. W. Rep. 16; *Produce Refrigerator Co. v. Norwich Union Ins. Assoc.*, Minn. , 97 N. W. Rep. 875; *Redner v. New York Ins. Co.*, Minn. , 99 N. W. Rep. 886.

RULE 55.

Appraisers not Limited to Kind or Quality of Evidence — Experts.

Appraisers are not limited to the kind or quality of evidence which may be considered by them; they may call in an expert on the special branch or point involved and give such weight to his opinion as they may see fit, if adopted as their own best judgment in good faith.

Bangor Bank v. Niagara Ins. Co., 85 Me. 68, 26 Atl. Rep. 991.

RULE 56.

Distinction as to Evidence When Property Wholly Destroyed or Damaged.

While appraisers may not always be required to take evidence as to the damage to property visible and open to their inspection, as to property wholly destroyed or not so visible and open to inspection, appraisers necessarily act upon information or evidence;¹ and both the insured and the company should receive notice of time and place of hearing.²

1. *Kaiser v. Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, *affd.*, 172 N. Y. 663, without opinion; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kans. 291, 46 Pac. Rep. 315, 26 Ins. L. J. 46; *Citizens' Ins. Co. v. Hamilton*, 48 Ill. App. 593; *Phoenix Ins. Co. v. Romeis*, 15 Ohio C. C. 697; *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 972. And see *Bangor Savings Bank v. Niagara Ins. Co.*, 85 Me. 68, 26 Atl. Rep. 991. And see Rule 50.

2. *Continental Ins. Co. v. Garrett*, 125 Fed. Rep. 589, 60 C. C. A. 395; *Stout v. Phoenix Assur. Co.*, N. J. Eq. , 56 Atl. Rep. 691.

RULE 57.**Appraisers' Decision as to Application of the Description in Policy to Property in Question Conclusive.**

Appraisers are presumed to have used their best judgment in ascertaining what particular articles or items of property were embraced within the words of general description as used in the policy, and their decision of the question is final and conclusive.

Chandos v. American Ins. Co., 84 Wis. 184, 22 Ins. L. J. 425, 54 N. W. Rep. 390.

RULE 58.**Effect of Improper Proposal by the Company's Appraiser.**

If the company's appraiser makes an improper proposal to the assured's appraiser the insured is relieved of any obligation to continue the appraisal, and where new appraisers are not appointed the appraisal clause is no defense to action on the policy.

Davis v. Guardian Assur. Co., 87 Hun, 414, 34 N. Y. Supp. 332, *affd.*, 155 N. Y. 682, on opinion below.

RULE 59.**Appraisers Must Follow Agreed Submitted Schedule.**

Appraisers have no authority to reject items in a mutually submitted schedule as not covered by the policy;¹ the award, to be binding, must be pursuant to the agreement of appraisal on submission.²

1. *Adams v. New York Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. Rep. 1149.

2. *Continental Ins. Co. v. Garrett*, 125 Fed. Rep. 589, 60 C. C. A. 395; *Rutter and Hendrix v. Hanover Ins. Co.*, Ala. , 35 So. Rep. 33.

RULE 60.

Proceedings not Invalid for Want of Oath by Appraisers.

Proceeding on appraisal and an award are not rendered void for want of an oath by the appraisers.

Zallee v. Laclede Ins. Co., 44 Mo. 530; *Stout v. Phoenix Assur. Co.*, N. J. Eq. , 56 Atl. Rep. 691.

RULE 61.

Appraisers Must Follow Limitations in Policy as to Amount of Loss or Damage.

Appraisers in estimating or ascertaining the loss are, unless otherwise stipulated by agreement, bound to follow the terms and limitations of the policy, that the loss or damage should in no event exceed what it would then cost to repair or replace; if the umpire or appraiser ignore or refuse to act upon such limitation of their power and authority, it renders the award void;¹ so they are bound to ascertain and determine sound value.²

1. *Providence-Washington Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. Rep. 679.

2. *Continental Ins. Co. v. Garrett*, 125 Fed. Rep. 589, 60 C. C. A. 395.

RULE 62.

Allowance Must be Made for Depreciation.

Appraisers should make proper deduction for depreciation by use, age, condition, location, or otherwise according to the circumstances of the particular case.

Michels v. Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. Rep. 56.

RULE 63.

Umpire May be Selected after Commencement of Appraisal.

An umpire may be chosen after commencement of appraisal without invalidating the award.

Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. Rep. 13. 35 Ins. L. J. 791; *Chandos v. American Ins. Co.*, 84 Wis. 184.

54 N. W. Rep. 390, 22 Ins. L. J. 425; *London & Lancashire Ins. Co. v. Storrs*, 71 Fed. Rep. 120, 17 C. C. A. 645, 36 U. S. App. 327, 25 Ins. L. J. 283. See Rules 10 and 67.

RULE 64.

When Umpire Has Authority to Act.

The umpire has no authority to act until the appraisers have performed their duty and until they finally differ;¹ but if, after reaching different estimates of the loss, one of the appraisers in bad faith endeavors to prevent further conference or to postpone it for some ulterior purpose, then the other appraiser acting in good faith has a right to regard their differences as a final disagreement, and thereupon to call in the umpire;² but notice and opportunity of being heard should be given.³

1. *Broadway Ins. Co. v. Doying*, 55 N. J. L. 569, 27 Atl. Rep. 927, 23 Ins. L. J. 394; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. Rep. 13, 25 Ins. L. J. 791, 86 Md. 86, 37 Atl. Rep. 782, 27 Ins. L. J. 493; *British-American Ins. Co. v. Darragh*, 128 Fed. Rep. 890, 63 C. C. A. 426.

2. *Broadway Ins. Co. v. Doying*, *supra*.

3. *Schmitt v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767.

RULE 65.

Duty of the Umpire.

It is the duty of the umpire to examine and consider the appraisement of each appraiser before arriving at his own determination; where he acts in a hasty and perfunctory manner and listens only to one appraiser and neglects or refuses to hear the other, it is sufficient misconduct to authorize a court of equity to set aside the award.¹ An award is not rendered void because an umpire, acting in good faith, adopts as his own the

opinion of a third person skilled in a special branch embraced in the appraisal.²

1. *Strome v. London Assur. Co.*, 20 App. Div. 571, 47 N. Y. Supp. 481, *affd.*, 162 N. Y. 627, without opinion; *Schmitt v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767; *N. Y. Mutual Savings Assoc. v. Manchester Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075; *British-American Assur. Co. v. Darragh*, 128 Fed. Rep. 890, 63 C. C. A. 426.

2. *Bangor Savings Bank v. Niagara Ins. Co.*, 85 Me. 68, 26 Atl. Rep. 991.

RULE 66.

Appraisers Have no Right to Make an Additional Award.

Appraisers having delivered an award have no right to make an additional award in the absence of further agreement upon the subject.

Eddy v. London Assur. Co., 65 Hun, 307, 20 N. Y. Supp. 216.

RULE 67.

Award Binding — Does not Depend upon Acceptance, Tender, or Payment.

An award of appraisers is binding even although the details connected with the appointment of the appraisers and the appraisal itself are not in strict accordance with the requirements of the policy. It is perfectly competent for the parties to waive or vary any or all of the conditions of the policy as to the time and mode of appraisal; they may voluntarily and mutually agree to refer questions to appraisers without any previous disagreement as to amount of loss,¹ and the binding effect of an award does not depend upon acceptance, tender, or payment.²

1. *London & Lancashire Ins. Co. v. Storrs*, 71 Fed. Rep. 120, 17 C. C. A. 645, 36 U. S. App. 327, 25 Ins. L. J. 283; *Remington Paper Co. v. London Assur. Co.*, 12 App. Div. 218, 43 N. Y.

Supp. 431; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kans. 291, 46 Pac. Rep. 315, 26 Ins. L. J. 46. And see *Hall v. Norwalk Ins. Co.*, 57 Conn. 105, 17 Atl. Rep. 356; *Enright v. Montauk Ins. Co.*, 15 N. Y. Supp. 893, affd. on opinion below, 142 N. Y. 667, 37 N. E. Rep. 570.

2. *Hanover Ins. Co. v. Lewis*, 28 Fla. 209. And see Rules 22, 29.

RULE 68.

Award Final and Conclusive—When Rendered Void.

In the absence of fraud or misconduct the determination of appraisers in an award properly made is conclusive and cannot be set aside merely for claimed inadequacy¹ or excessiveness;² but an award may be so grossly inadequate that when it appears in connection that company's appraiser controlled both the other appraiser and the umpire, or was not in fact disinterested and impartial, it is ground for setting same aside;³ and so where appraiser acts under assured's direction, and not on his own judgment, examination, and investigation, but arrives at result on assured's bills, invoices, and books, it is such misconduct as to void the award.⁴

1. *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 972; *Strome v. London Assur. Co.*, 20 App. Div. 571, 47 N. Y. Supp. 481, affd., 162 N. Y. 627, without opinion. And see *Fleming v. Phoenix Assur. Co.*, 75 Hun, 530, 27 N. Y. Supp. 488.

2. *Hartford Ins. Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378, 15 U. S. App. 134, 5 C. C. A. 524.

3. *Glover v. Rochester German Ins. Co.*, 11 Wash. 143, 39 Pac. Rep. 380; *Royal Ins. Co. v. Parlin Co.*, 12 Tex. Civ. App. 572, 34 S. W. Rep. 401; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137; *Kaiser v. Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344; *Insurance Co. of N. A. v. Hegewald*, 161 Ind. 631, 66 N. E. Rep. 902. And see *Perry v. Greenwich Ins. Co.*, N. C. , 49 S. E. Rep. 889.

4. *Hartford Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 151.

RULE 69.

**Courts Will not Interfere with Award — Strong Proof Required
— When set Aside.**

The settled doctrine of the decisions precludes an investigation by the court after an award has been properly made of the question of the measure of damage, unless there was corruption or partiality of the appraisers or misconduct during the course of the appraisal, or fraud in the opposite party;¹ it requires strong proof of fraud, accident, mistake, or concealment to justify interference by the court with an award; neither error of judgment nor mistake of fact, unless gross and palpable, affords any ground;² in absence of fraud or dishonesty an award cannot be set aside for mistakes or omissions of the appraisers unless same appear upon face of the appraisal and award itself;³ exclusion of pertinent or material evidence by appraisers is usually fatal to an award;⁴ or proceeding without notice to assured and appraisers or without affording opportunity of being heard;⁵ but refusal to hear evidence does not necessarily make void the award.⁶

1. *Hartford Ins. Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378, 15 U. S. App. 134, 5 C. C. A. 524, 22 Ins. L. J. 801; *Barnard v. Lancashire Ins. Co.* (C. C. A.), 101 Fed. Rep. 36; *Robertson v. Lion Ins. Co.*, 73 Fed. Rep. 928. And see *Fleming v. Phoenix Assur. Co.*, 75 Hun, 530; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Morley v. Liverpool, L. & G. Ins. Co.*, 85 Mich. 210; *Liverpool, L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13; *Springfield Ins. Co. v. Payne*, 57 Kans. 291; *Stockton Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. Rep. 633; *Cassidy v. Royal Exchange Ins. Co.*, Me., 59 Atl. Rep. 549; *Billmyer v. Hamburg-Bremen Ins. Co.*, W. Va., 49 S. E. Rep. 901.

2. *Bates v. British American Ins. Co.*, 100 Ga. 249, 28 S. E. Rep. 155. And see *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. Rep. 932; *Ætna Ins. Co. v. Davis* (Ky.), 55 S. W. Rep. 705; *Vincent v. German Ins. Co.*, 120 Iowa, 272, 94 N. W. Rep. 458.

3. *Remington Paper Co. v. London Assur. Co.*, 12 App. Div. 218, 43 N. Y. Supp. 431; *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 972. And see *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. Rep. 904.

4. *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. Rep. 932; *Canfield v. Watertown Ins. Co.*, 55 Wis. 419; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kans. 291, 46 Pac. Rep. 315, 26 Ins. L. J. 46; *Stemmer v. Scottish Ins. Co.*, *supra*.

5. *Linde v. Republic Ins. Co.*, 50 N. Y. Super. 362; *Hills v. Home Ins. Co.*, 129 Mass. 345; *Schreiber v. German-American Ins. Co.*, 43 Minn. 367; *Phoenix Ins. Co. v. Moore* (Tex. Civ. App.), 46 S. W. Rep. 1131. And see cases under note 1, *supra*.

6. *Hall v. Norwalk Ins. Co.*, 57 Conn. 105; *Liverpool, L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13. And see *Stemmer v. Scottish Ins. Co.*, *supra*; *Vincent v. German Ins. Co.*, 120 Iowa, 272, 94 N. W. Rep. 458.

RULE 70.

Award Cannot Exceed Amount of Policy.

The amount of the award cannot exceed the amount of the policy.

Imperial Ins. Co. v. Kiernan, 83 Ky. 469.

RULE 71.

Award Invalid When Made by Umpire and One of the Appraisers, When Other Withdraws before Completion of Appraisal.

Where one of the appraisers withdraws before the completion of the work of appraisal, and the award is then made by the other appraiser and the umpire, the award is invalid because not made in accordance with the policy which requires combined action by the appraisers. If the withdrawal of the appraiser is at in-

stigation of the insured, it defeats recovery; otherwise, where he is not in fault; it is a question for a jury.

Caledonian Ins. Co. v. Traub, 83 Md. 524, 35 Atl. Rep. 13, 25 Ins. L. J. 791.

RULE 72.

Award Binding Only to Extent of Subject-Matter Submitted.

An award is binding only to the extent of the subject-matter submitted and acted upon by the appraiser; when confined to visible damaged property it does not exclude subsequent claim and evidence of other and additional proper loss and damage.

Hong Sling v. Scottish Union Ins. Co., 7 Utah, 441, 27 Pac. Rep. 170. And see *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176, 14 S. E. Rep. 731; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. Rep. 183; *Liverpool, L. & G. Ins. Co. v. Colgin (Tex.)*, 34 S. W. Rep. 291; *Rutter and Hendrix v. Hanover Ins. Co.*, Ala. , 35 So. Rep. 33.

RULE 73.

Concealment of Material Evidence by Insured.

Concealment of material evidence by the assured may operate as evidence of a fraud avoiding an award in consequence of it.

Stockton Works v. Glens Falls Ins. Co., 98 Cal. 557, 33 Pac. Rep. 633.

RULE 74.

Award not Set Aside on Evidence of Other Independent Appraisers.

An award will not be set aside on ground of fraud, mistake, or inadequacy, upon evidence of independent appraisers employed subsequently by the assured, and

who form their estimate mainly from what is told them by the assured and who do not have the same opportunities of personal examination as those by whom the award was regularly made, notwithstanding a great discrepancy or difference in the amounts.

Michels v. Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. Rep. 56.

RULE 75.

Company Cannot Retain Advantage of Award Obtained by Fraud of Adjuster on Claim That He Had no Authority to Act.

An insurance company cannot retain the advantage of an award by appraisers when held void through fraud by the plea that the adjuster guilty of the fraud did not represent it and was not authorized to act in its behalf.

Kaiser v. Hamburg-Bremen Ins. Co., 59 App. Div. 525, 60 N. Y. Supp. 344, *affd.*, 172 N. Y. 663, without opinion.

RULE 76.

Meaning of Misconduct by Appraisers.

Misconduct requiring the setting aside of an award by appraisers does not necessarily mean an evil intention as an essential ingredient; there may be unfairness or acts contrary to power and authority or in excess of it without imputing improper motives to the appraisers.

Providence-Washington Ins. Co. v. Board of Education, 49 W. Va. 360, 38 S. E. Rep. 679; *Kearney v. Washtenaw Ins. Co.*, 126 Mich. 246, 85 N. W. Rep. 733; *N. Y. Mutual Savings Assoc. v. Manchester Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075.

RULE 77.**Duty of Parties when Award Objected to on Ground of Fraud or Misconduct.**

If an award is objected to or attacked upon the ground of fraud or misconduct of the appraisers, and one party to the controversy notifies the other of that fact, demanding a reappraisement on account of such misconduct, it then becomes the duty of the other party to investigate the validity of the charges and determine whether or not he will abide by the award or submit to a reappraisement; and if it is determined to abide by the award and refuse to submit to a reappraisement the party is thereby estopped from thereafter demanding another appraisal in case the charges shall prove to be sustained. This rule applies impartially to action of either party.

Christianson v. Norwich Union Ins. Soc., 84 Minn. 526, 88 N. W. Rep. 16; *Produce Refrigerator Co. v. Norwich Union Ins. Assoc.*, Minn. , 97 N. W. Rep. 875.

RULE 78.**Award Void for Uncertainty.**

An award is void for uncertainty when no amount is named or means indicated by which it can be found.

St. Paul F. & M. Ins. Co. v. Gotthelf, 35 Nebr. 351, 53 N. W. Rep. 137, 22 Ins. L. J. 34.

RULE 79.**Award not Limited by Two-thirds Clause in Policy.**

An appraisal and award of actual damage, with proper deductions is not an appraisal of the value of a building, and hence the award is not limited or affected by a two-thirds value clause in the policy.

Snowden v. Kittanning Ins. Co., 122 Pa. St. 502.

RULE 80.

Not Necessary to Return or Tender Money Received under a Void Award before Suit in Equity.

Where the assured brings suit in equity to set aside an award, it is not necessary to first tender the money which has been received thereunder, but it is necessary to offer to restore the same in the complaint and to make the same offer on the trial; the only exception is where concededly the assured is entitled in any event to all that has been received.

Remington Paper Co. v. London Assur. Co., 12 App. Div. 218, 43 N. Y. Supp. 431. And see *Townsend v. Greenwich Ins. Co.*, 39 Misc. 87, 78 N. Y. Supp. 897, *affd.*, 86 App. Div. 323, 83 N. Y. Supp. 909, *affd.*, 178 N. Y. 634, without opinion.

RULE 81.

Recovery of Interest when Award Set Aside.

Where assured brings his suit to set aside an award of appraisers and to recover on the policy he should not be allowed to recover interest until decree is entered, because the award being rejected there was nothing to compute interest on.

Stemmer v. Scottish Ins. Co., 33 Oreg. 65, 27 Ins. L. J. 992, 53 Pac. Rep. 498.

RULE 82.

Remedy of Insured when Award Claimed to be Void.

If award is claimed by the assured to be void on the ground of fraud, in a State where under a Code of Practice both legal and equitable relief may be obtained in the same suit or court, action may be brought upon the policy, and if the company sets up the award as a defense, assured may under a reply, or without a

reply, where that is not required, prove upon the trial the facts making void the award;¹ or in the complaint upon the policy assured may set forth the facts and ask to have the award set aside.² If insured fails to establish right to equitable relief, his complaint must state facts entitling him to judgment at law upon the policy.³

1. *Sullivan v. Traders' Ins. Co.*, 169 N. Y. 213, 62 N. E. Rep. 146.

2. *Maher v. Home Ins. Co.*, 75 App. Div. 226, 78 N. Y. Supp. 44; *Vincent v. German Ins. Co.*, 120 Iowa, 272, 94 N. W. Rep. 458.

3. *Bellinger v. German Ins. Co.*, 95 App. Div. 262, 88 N. Y. Supp. 1022.

RULE 83.

Remedy when Distinction between Common-Law and Equity Practice Prevails—Burden of Proof—No Cause of Action on Award Itself.

In a State where the distinction between the common-law and equity practice prevails, in an action at law upon the policy, the award is conclusive and evidence to impeach it is not admissible; either party desiring to attack it must have resort to a court of equity,¹ but otherwise in a State where such distinction does not prevail. Where a company's answer to an action upon the policy sets up an award its validity may be attacked in reply or by proper evidence and determined in same action;² and in such a case the burden of proof rests upon the party asserting it to establish the fraud or other fact invalidating the award.³ There is no cause of action on the award itself independent of the terms and conditions of the policy,⁴ unless coupled with an express promise to pay it.⁵

1. *Robertson v. Scottish Union Ins. Co.*, 68 Fed. Rep. 173; *Billmyer v. Hamburg-Bremen Ins. Co.*, W. Va., 49 S. E. Rep. 901; *Fire Assoc. v. Allesina*, Oreg., 77 Pac. Rep. 123.

2. *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. Rep. 436, rehearing denied, 16 Wash. 239, 47 Pac. Rep. 485; *Phoenix Ins. Co. v. Romeis*, 15 Ohio C. C. 697; *Canfield v. Watertown Ins. Co.*, 55 Wis. 419, 13 N. W. Rep. 252. And see Rule 82.

3. *German-American Ins. Co. v. Johnson*, 4 Kans. App. 357, 45 Pac. Rep. 972.

4. *Soars v. Home Ins. Co.*, 140 Mass. 343, 5 N. E. Rep. 149; *Haslinger v. Long Island Ins. Co.*, 62 Mich. 144; *British-American Ins. Co. v. Darragh*, 128 Fed. Rep. 890, 63 C. C. A. 426; *Billmyer v. Hamburg-Bremen Ins. Co.*, W. Va., 49 S. E. Rep. 901.

5. *Stockton Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. Rep. 633.

RULE 84.

Competency of Evidence of Appraisers.

In an action brought on a policy and to set aside an award of appraisers it is competent for one of the appraisers who refused to join in the award to testify to acts of partiality and misconduct on part of the other appraisers.

Levine v. Lancashire Ins. Co., 66 Minn. 138, 26 Ins. L. J. 36, 68 N. W. Rep. 855.

RULE 85.

Remedy of Insurance Companies in Equity to Enforce Award.

In a complicated case where the policies are not concurrent in terms or form and to avoid a multiplicity of actions to determine the proportionate liability of each company where there has been an appraisal and an award, the insurance companies joining therein may tender the aggregate amount of the award to the insured, and then if refused may file a bill in equity to enforce same and enjoin separate actions at law upon the policies.

American Central Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. Rep. 400, 27 Ins. L. J. 276.

RULE 86.

Insured May Obtain Relief from Effect of Limitation Clause by Cross-Bill in Same Suit.

When an insurance company has filed a bill in equity to enjoin the insured from bringing an action at law on the policy and an award of appraisers, and obtains a temporary injunction restraining such action which continues in force until after the limitation clause in the policy has become operative, it is proper for the insured to file a cross-bill setting forth the facts and ask for affirmative relief from such effect of the injunction and for payment of the amount due under the policy as determined by the award. The court having obtained jurisdiction will retain it, and it is no valid objection to such cross-bill that it asserts a claim cognizable at law.

North British & Mercantile Ins. Co. v. Lathrop, 63 Fed. Rep. 508, *affd.*, 70 Fed. Rep. 429, 17 C. C. A. 175.

RULE 87.

Waiver of Appraisal.

An agreement or adjustment of amount of loss renders the appraisal clause inoperative or as a waiver of same;¹ and so where the proofs are accepted without objection or a demand for an appraisal;² and so where the company has demanded an appraisal, but fails to name an appraiser and to appear at time and place designated;³ and so where company delays demanding an appraisal after furnishing of proofs it may be evidence of waiver;⁴ and so where company delays for twenty-one days to respond to objection of assured to

its proposed appraiser coupled with difficulty of preserving goods damaged;⁵ the appraisal may be orally waived and a waiver does not depend on written evidence⁶ and is waived by exercise of option to repair, replace, or rebuild,⁷ or by refusal of company to have appraisal or to proceed thereunder on assured's request.⁸

1. *Wholley v. Western Assur. Co.*, 174 Mass. 263, 54 N. E. Rep. 548, 28 Ins. L. J. 263; *Manchester Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. Rep. 1110.

2. *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. Rep. 945; *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112, 51 N. W. Rep. 1122; *Randall v. Insurance Cos.*, 10 Mont. 340, 362, 368, 25 Pac. Rep. 953, 960. And see *Everett v. London & L. Ins. Co.*, 142 Pa. St. 332, 21 Atl. Rep. 819.

3. *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. Rep. 239.

4. *American Ins. Co. v. Stuart (Tex.)*, 38 S. W. Rep. 395; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611. And see *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Tilley v. Connecticut Ins. Co.*, 86 Va. 811, 11 S. E. Rep. 120; *Zimeriski v. Ohio Farmers' Ins. Co.*, 91 Mich. 600, 52 N. W. Rep. 55; *Robertson v. New Hampshire Ins. Co.*, 16 N. Y. Supp. 842.

5. *McManus v. Western Assur. Co.*, 22 Misc. 269, 48 N. Y. Supp. 820, *affd.* on opinion below, 43 App. Div. 550, *affd.*, 167 N. Y. 602, without opinion.

6. *Hutchinson v. Liverpool, L. & G. Ins. Co.*, 153 Mass. 143, 26 N. E. Rep. 439; *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. Rep. 863.

7. *Wynkoop v. Niagara Ins. Co.*, 91 N. Y. 478; *Elliot v. Insurance Co.*, 109 Iowa, 39.

8. *Continental Ins. Co. v. Wilson*, 45 Kans. 250, 25 Pac. Rep. 629; *Powers Dry Goods Co. v. Imperial Ins. Co.*, 48 Minn. 380, 51 N. W. Rep. 123; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 332, 36 N. E. Rep. 408; *Schouweiler v. Merchants' Ins. Co.*, 11 S. D. 401. And see Rule 88.

RULE 88.

Insured May by Notice Create Evidence of Waiver.

When assured notifies the insurance company that unless loss is adjusted or agreement for appraisal made within a certain reasonable time it will be deemed to have waived an appraisal, and company takes no action and makes no response, it may become evidence of a waiver of appraisal.

Chainless Cycle Co. v. Security Ins. Co., 52 App. Div. 104, 64 N. Y. Supp. 1060, *affd.*, 169 N. Y. 304, 62 N. E. Rep. 392. (About a week was the time named in this case.) See Rule 2.

RULE 89.

Denial of Liability as Waiver.

An unqualified denial of liability and refusal to adjust the loss operates as a waiver of an appraisal;¹ but not where the assured has refused to submit to an appraisal.²

1. *Thomas v. Lebanon Ins. Co.*, 78 Mo. App. 268; *Vining v. Franklin Ins. Co.*, 89 Mo. App. 311; *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Baille v. Western Assur. Co.*, 49 La. Ann. 658, 21 So. Rep. 736, 26 Ins. L. J. 497; *Betcher v. Capital Ins. Co.*, 78 Minn. 240, 80 N. W. Rep. 971; *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125; *Home Ins. Co. v. Kennedy*, 47 Nebr. 138, 66 N. W. Rep. 278; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401; *Hennesy v. Niagara Ins. Co.*, 8 Wash. 91, 35 Pac. Rep. 585, 23 Ins. L. J. 796; *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549; *Lamson Consolidated Stove Co. v. Prudential Ins. Co.*, 171 Mass. 433, 50 N. E. Rep. 943, 28 Ins. L. J. 70; *Stoddard v. Cambridge Ins. Co.*, 75 Vt. 253, 54 Atl. Rep. 284; *Hamburg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. Rep. 388, 26 Ins. L. J. 782; *Stephens v. Union Assur. Soc.*, 16 Utah, 22, 50 Pac. Rep. 626; *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 31 Pac. Rep. 66, 21 Ins. L. J. 957; *American Cent. Ins. Co. v. Donlon (Colo.)*, 66 Pac. Rep. 249; *Margeson v. Commercial Union Assur. Co.*,

31 N. S. 337; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. Rep. 13, 24 Ins. L. J. 458; *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. Rep. 290; *White v. Farmers' Ins. Co.*, 97 Mo. App. 590, 71 S. W. Rep. 707; *Hickerson v. German-American Ins. Co.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 25 Ins. L. J. 422; *Yost v. Dwelling-House Ins. Co.*, 179 Pa. St. 381, 35 Atl. Rep. 517; *Moyer v. Sun Ins. Co.*, 176 Pa. St. 579, 35 Atl. Rep. 221; *Bailey v. Aetna Ins. Co.*, 77 Wis. 336, 46 N. W. Rep. 440; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 98; *German-American Ins. Co. v. Etherton*, 25 Nebr. 535, 41 N. W. Rep. 406; *Wainer v. Milford Ins. Co.*, 153 Mass. 335, 26 N. E. Rep. 877; *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. Rep. 1031; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869; *Seigle v. Badger Lumber Co.*, 106 Mo. App. 110, 80 S. W. Rep. 4; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. Rep. 757.

2. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28, 10 S. E. Rep. 1057.

RULE 90.

Denial of Liability when Coupled with Demand for Appraisal.

A denial of liability is not necessarily a denial of the amount of the loss and is not so inconsistent therewith as to amount to a waiver of an appraisal of the amount of the loss unless such denial is made under such circumstances or is accompanied by such conduct as would make an appraisal fruitless, or such as would justify the assured in believing that an attempt on his part to perform the condition would not be responded to by the insurance company. No such claim can be made by the assured when the company demands an appraisal.

Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

RULE 91.

Omission or Refusal to Join in Appraisal Does not Estop Company from Insisting on Competent Evidence—Ex Parte Appraisal.

The omission or refusal of an insurance company to join in an appraisal and denial of liability does not

estop it from insisting that its liability shall be established by competent evidence; an *ex parte* appraisal is not such evidence.

Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. Rep. 138, 28 Ins. L. J. 223.

RULE 92.

No Waiver when Demanded in Proper Time.

An adjuster's attempt to appraise does not operate as a waiver of an appraisal pursuant to the terms of the policy when demanded in proper time;¹ silence of the company during such period does not amount to a waiver.²

1. Scottish Union & National Ins. Co. v. Clancy, 83 Tex. 113, 18 S. W. Rep. 439.

2. Phoenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. Rep. 408. See Rule 2.

RULE 93.

When Policy Provides for Written Request.

When the policy provides that an appraisal shall be had at "written request of either party," and there is no such request by either, the clause ceases to be a condition precedent to the loss becoming due and payable,¹ or else may be regarded as evidence of waiver;² and so the company's omission or neglect to comply with the assured's request for an appraisal becomes evidence of waiver.³

1. Wright v. Susquehanna Ins. Co., 110 Pa. St. 29, 20 Atl. Rep. 716; German Ins. Co. v. Everett, 18 Tex. Civ. App. 514, 46 S. W. Rep. 95.

2. Garretson v. Merchants' Ins. Co., 114 Iowa, 17, 86 N. W. Rep. 32. And see Probst v. American Central Ins. Co., 64 Mo. App. 408.

3. *Hutchinson v. Liverpool, L. & G. Ins. Co.*, 153 Mass. 143, 26 N. E. Rep. 439; *Milwaukee Mechanics' Ins. Co. v. Schallman*, 90 Ill. App. 280, *affd.*, 188 Ill. 213, 59 N. E. Rep. 12.

It has been held in California that if there is no request by either party and there is no appraisal, the condition is violated and no recovery can be had. *Adams v. South British Ins. Co.*, 70 Cal. 198. See Rules 8, 87, 88.

RULE 94.

Failure to Demand as Evidence of Waiver.

When policy provides that the loss becomes due and payable sixty days after furnishing of proofs of loss, including an award by appraisers, when an appraisal has been required and there is no demand for an appraisal within sixty days after the receipt of proofs, it is evidence of waiver;¹ demand should be within sixty days after the fire or made promptly on receipt of proofs.²

1. *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235.

2. *Lion Ins. Co. v. Heath*, 29 Tex. Civ. App. 203, 68 S. W. Rep. 305. See Rules 2, 87.

RULE 95.

Appraisal May be Made Evidence of Waiver.

An appraisal and award may be acceptable as satisfactory proofs of loss or be made evidence of waiver thereof,¹ specially when coupled with an agreement by the company or its representative to pay the amount of the award as soon as made.²

1. *Smith v. Herd*, Ky. , 60 S. W. Rep. 841. And see *London & Lancashire Ins. Co. v. Storrs*, 71 Fed. Rep. 120, 17 C. C. A. 645, 25 Ins. L. J. 283.

2. *Snowden v. Kittanning Ins. Co.*, 122 Pa. St. 502. See Rule 96.

RULE 96.

No Waiver by Appraisal under Standard Form — Effect of Other Acts in Connection — Waiver of Options or Time — Appraisal Agreement.

Under the specific language of the standard form an appraisal cannot be claimed of itself to be evidence of a waiver,¹ but other acts not so provided for in connection may be evidence of waiver raising a question of fact for a jury;² and demand for appraisal or appraisal may operate as evidence of a waiver of option to rebuild;³ or of proofs of loss within limited time,⁴ but not of proofs;⁵ an agreement for submission to appraisal after the loss may guard against waiver by proper terms.⁶

1. *Walker v. Phoenix Ins. Co.*, 89 Hun, 333, 35 N. Y. Supp. 374, revd., 156 N. Y. 628, 633, 51 N. E. Rep. 392, but without affecting this rule; *Gibson Electric Co. v. Liverpool, L. & G. Ins. Co.*, 10 App. Div. 225, 41 N. Y. Supp. 675, affd., 159 N. Y. 418, 54 N. E. Rep. 23; *Kiernan v. Dutchess County Ins. Co.*, 150 N. Y. 190, 44 N. E. Rep. 698; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *American Central Ins. Co. v. Bass*, 90 Tex. 380, 38 S. W. Rep. 1119, 26 Ins. L. J. 718; *Fournier v. German-American Ins. Co.*, 23 R. I. 36, 49 Atl. Rep. 98; *City Drug Store v. Scottish Union Ins. Co. (Tex.)*, 44 S. W. Rep. 21; *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 So. Rep. 116; *Holbrook v. Baloise Ins. Co.*, 117 Cal. 561, 49 Pac. Rep. 555. And see *Briggs v. Firemen's Fund Ins. Co.*, 65 Mich. 52; *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. Rep. 59.

2. *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. Rep. 54; *Kiernan v. Dutchess County Ins. Co.*, *supra*; *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 633, 51 N. E. Rep. 392.

3. *McAllaster v. Niagara Ins. Co.*, 156 N. Y. 80.

4. *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844; *Exchange Bank v. Thuringia Ins. Co.*, Mo. App., 83 S. W. Rep. 534. But see and compare *Fournier v. German-American Ins. Co.*, *supra*.

5. *Wicking v. Citizens' Ins. Co.*, 118 Mich. 640, 647, 77 N. W. Rep. 275.

8. *Gilligan v. Commercial Ins. Co.*, 20 Hun, 93, *affd.* without opinion, 87 N. Y. 626; *Cook v. North British & M. Ins. Co.*, 181 Mass. 101, 62 N. E. Rep. 1049.

RULE 97.

Rule of Waiver as Imposed by Contract.

The insurance company does not waive any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal provided for.

This rule is imposed in above terms by the standard form of policy prescribed in New York and other States, as stated under Rule 1, excepting the State of Wisconsin, which is the same except that the following words are inserted "except as above expressly provided for." See appraisal clause in Wisconsin form under Rule 1.

The standard forms of Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota do not contain provision as to waiver. See also "Waiver."

RULE 98.

Effect of Statute Fixing Amount of Loss.

Where there is a statute making the amount of the policy the measure of damage in event of destruction of a building, and the building insured is wholly destroyed, the appraisal clause is inoperative;¹ but otherwise where there is only partial destruction;² or wherever under the terms of the statute the amount written is not made conclusive evidence of value or amount of recovery;³ consent to appraisal does not operate as a waiver of claim to a total loss.⁴

1. *German Ins. Co. v. Eddy*, 36 Nebr. 461. 54 N. W. Rep. 856. 22 Ins. L. J. 468; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. Rep. 1072; *Phoenix Ins. Co. v. Port Clinton Fish Co.*,

14 Ohio C. C. 160; *Merchants' Ins. Co. v. Stephens* (Ky.), 59 S. W. Rep. 511; *O'Keefe v. Liverpool, L. & G. Ins. Co.*, 140 Mo. 558, 41 S. W. Rep. 922, 26 Ins. L. J. 888; *Hartford Ins. Co. v. Bourbon Co.*, 115 Ky. 109, 72 S. W. Rep. 739; *Marshall v. American Mutual Ins. Co.*, 80 Mo. App. 18; *Jacobs v. North British & M. Ins. Co.*, 61 Mo. App. 572; *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577; *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93; *Ætna Ins. Co. v. Shacklett* (Tex.), 57 S. W. Rep. 583; *Doxey v. Royal Ins. Co. (Tenn.)*, 36 S. W. Rep. 950, *affd. orally* by the Supreme Court; *Thompson v. Insurance Cos.*, 43 Wis. 459, 45 Wis. 388; *Seyk v. Millers' Ins. Co.*, 74 Wis. 67, 41 N. W. Rep. 443. And see *Ritchie v. Firemen's Ins. Co.*, W. Va. , 47 S. E. Rep. 94.

2. *Stemmer v. Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. Rep. 498, 27 Ins. L. J. 972; *Hartford Ins. Co. v. Bourbon Co.*, *supra*.

3. *Zalesky v. Home Ins. Co.*, 108 Iowa, 341, 79 N. W. Rep. 69; *Baker v. Phoenix Assur. Co.*, 57 Mo. App. 559.

4. *Pennsylvania Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. Rep. 962.

RULE 99.

Appraisal under Statute Fixing Amount of Loss.

Where a building destroyed by fire was worth more than the value of the foundations (\$500) over the total amount of insurance, a difference of opinion as to the application of the \$500 value left in the foundations becomes immaterial, and cannot be urged as a ground of difference requiring an appraisal, when a statute makes the company liable for amount insured, and, except in case of a total loss, requires an appraisal.

Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. Rep. 212.

CHAPTER FOURTH.

Statement or Proof of Loss and Other Requirements or Conditions Precedent to Loss Becoming Due and Payable — Iron Safe Clause — Fraud.

- TITLE** 1. Statement or proof of loss.
2. Plans and specifications.
3. Certificate of magistrate or notary.
4. Examination of insured under oath.
5. Production of books of account, bills, and invoices.
6. Iron safe clause.
7. Fraud or false swearing.

TITLE I.

Statement or Proof of Loss.

- RULE** 1. Duty of insured to render a statement or proof of loss as imposed by contract.
2. Clause requiring statement or proof of loss a condition precedent.
3. Time for serving statement or proof commences to run from termination of the fire.
4. Statement must be furnished in specified time — When in reasonable time — Excuses for delay.
5. Mailing statement in prescribed time but not received in such time.
6. Distinction between failure to furnish in time and defects in form.
7. When statement or proof required forthwith.
8. Question of due diligence.
9. When time not essence of the contract.
10. Modification of Rule 2 — Effect of not furnishing proof in prescribed time.
11. When time prescribed expires on Sunday.
12. Presumption from mailing — Delivery.
13. When insured is dead.
14. Delivery of proofs to company or agent.
15. Authority of local agent.
16. Insured must furnish the proofs — Exceptions.
17. Duty of mortgagee.

RULE 18. Attaching creditor.

19. When policy taken out for benefit of insured and other owners.
20. When loss made payable to a third party.
21. Substantial compliance sufficient.
22. When policy insures party on property in possession or for which liable.
23. Provision as to statement of other insurance.
24. Carpenter's bill or statement not a substitute or compliance.
25. Statement or proof of stocks of merchandise — Actual cash value should be stated.
26. Statement limited to particulars called for by the policy.
27. When insured holds more than one policy of same company.
28. Conditions operative only when required are independent of the statement or proof of loss.
29. Statements refer to date of fire.
30. Effect of overestimate of value.
31. In case of a reinsurance policy.
32. When building a total loss in Pennsylvania.
33. Statements in proofs not evidence of amount of loss.
34. Insured not estopped or bound by his statements in proofs.
35. Waiver by local agent.
36. Local agent may be clothed with apparent authority.
37. Defects not specifically pointed out to insured waived.
38. Objections must be made promptly.
39. Insured must have opportunity to supply or remedy defects.
40. Insured must have reasonable time to comply with objections to proofs.
41. Company not obliged to return proofs to make objections effective.
42. Waiver of written extension of time.
43. Company under no obligation to furnish blanks — Refusal not construed as waiver.
44. Waiver by refusal to adjust or pay, company having the policy.
45. Reference to policy not sufficient objection.
46. Effect of refusal to deliver policy on parol contract.
47. Effect of adjustment or agreement as to amount of loss.

- RULE 48.** Appraisal and proofs of loss distinct and separate — Waiver.
- 49. Authority of adjuster.
 - 50. Waiver by adjuster.
 - 51. Same subject — Limitations and nonwaiver agreements.
 - 52. Denial of liability as waiver.
 - 53. Denial of liability must extend to entire claim.
 - 54. Denial of liability coupled with demand for proofs.
 - 55. Denial of liability coupled with disclaimer of intention to waive.
 - 56. Question of waiver as one of fact or law.
 - 57. When denial of liability operates as waiver.
 - 58. Nonwaiver agreement.
 - 59. Waiver and estoppel — Essentials.
 - 60. Waiver once made final.
 - 61. Effect of statute fixing amount of loss on building.
 - 62. Waiver of statement or proofs of loss.
 - 63. Limitations as to waiver of statement or proofs of loss.

RULE 1.

Duty of Insured to Render a Statement or Proof of Loss as Imposed by Contract.

Within sixty days after the fire, unless such time is extended in writing by the company it is the duty of insured to render a statement to the company signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of the property covered by the insurance, and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of the property since the issuing of the policy; by whom and for what purpose any building

in the policy described and the several parts thereof were occupied at time of the fire.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,

New Jersey,
North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

In Wisconsin same, except time may be extended "by agreement through local agent or any other authorized agent or adjuster."

The standard form of policy prescribed in Massachusetts provides that "In case of any loss or damage a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured."

In Maine the provision is the same except the words "within a reasonable time" are substituted for the word "forthwith."

In Minnesota the provision is the same except "in case of total loss on buildings the value of said buildings need not be stated."

In New Hampshire the provision is the same, except that the words "in detail" follow after "value of the property insured," instead of after "other insurance thereon."

In South Dakota the provision reads: "Within sixty days from the time of the occurrence of the fire, the insured shall make a statement in writing, sign and swear to the same, and render to the company, setting forth substantially the property destroyed or damaged and a statement or estimate of the amount of his loss (except in case of total loss on buildings where the fire occurs without criminal fault on the part of the insured, or his assigns, in which case the value on the buildings need not be stated), the interest of the insured therein, all other insurance thereon, the purpose for which the building insured or containing the property insured was used, and by whom occupied, and the time and manner in which the fire originated as far as known to the insured. Should proof of loss not be furnished within six months from the date of loss this policy shall be void, unless such proof of loss shall have been waived."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Clause Requiring Statement or Proof of Loss a Condition Precedent.

The clause requiring furnishing of proofs is binding as a condition precedent unless waived.

*See note to "Duty to Save and Preserve Property," I

: *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Bruce v. Phoenix Ins. Co.*, 24 Oreg. 486, 34 Pac. Rep. 16; *German Ins. Co. v. Davis*, 40 Nebr. 700, 59 N. W. Rep. 698, 23 Ins. L. J. 768; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. Rep. 606, 25 Ins. L. J. 267, affg. 55 Ill. App. 622; *Dwelling-House Ins. Co. v. Jones*, 47 Ill. App. 261; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. Rep. 463, 22 Ins. L. J. 310; *Maddox v. Dwelling-House Ins. Co.*, 56 Mo. App. 343; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. Rep. 628; *McDermott v. Lycoming Ins. Co.*, 44 N. Y. Super. 221; *Sharpe v. Milwaukee Mechanics' Ins. Co.*, 8 App. Div. 356, 40 N. Y. Supp. 817, affd. on opinion below, 158 N. Y. 696; *American Central Ins. Co. v. Birds' B. & L. Assoc.*, 81 Ill. App. 258; *Central City Ins. Co. v. Oates*, 86 Ala. 558, 6 So. Rep. 83; *Atlas Assur. Co. v. Brownell*, 29 Can. S. C. 537, 601; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 362; *American Central Ins. Co. v. Hathaway*, 43 Kans. 399, 23 Pac. Rep. 428; *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. Rep. 1024; *McCormick v. North British Ins. Co.*, 78 Cal. 468, 21 Pac. Rep. 14; *Peninsular Land Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. Rep. 237; *Blakely v. Phoenix Ins. Co.*, 20 Wis. 205; *Eastern R. Co. v. Relief Ins. Co.*, 98 Mass. 420; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Bornazewski v. Middlesex Assur. Co.*, Mass. , 72 N. E. Rep. 250.

RULE 3.

Time for Serving Statement or Proof Commences to Run from Termination of the Fire.

Where fire lasts or continues for several days the time for serving proof of loss commences to run from the day of its termination and not necessarily from the day on which it started.

National Wall Paper Co. v. Associated Mfrs.' Ins. Co., 60 App. Div. 222, 70 N. Y. Supp. 124, affd. on a subsequent appeal, 175 N. Y. 226, 67 N. E. Rep. 440.

RULE 4.

Statement Must be Furnished in Specified Time — When in Reasonable Time — Excuses for Delay.

The statement must be furnished within the specified time;¹ if no time mentioned in the policy and in terms

or substance the condition requires the statement "as soon as possible" "or forthwith," it means within reasonable time according to the special circumstances in each case;² under such language illness or physical disability while it lasts might be regarded as excusing delay;³ or insanity;⁴ there may be excuse for delay even under present form of the insurance contract;⁵ but accident or misfortune, unless caused by the insurance company, does not excuse performance.⁶

1. *Blossom v. Lycoming Ins. Co.*, 64 N. Y. 162; *Peabody v. Satterlee*, 166 N. Y. 174; *Sergeant v. Liverpool, L. & G. Ins. Co.*, 85 Hun, 31, 32 N. Y. Supp. 594, revd., 155 N. Y. 349, without affecting rule, court holding evidence of waiver should have been submitted to jury; *McDermott v. Lycoming Ins. Co.*, 12 Jones & Sp. 221; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. Rep. 463; *Westchester Ins. Co. v. Coverdale*, 9 Kans. App. 651, 58 Pac. Rep. 1029; *White v. Home Ins. Co.*, 128 Cal. 131, 60 Pac. Rep. 666. And see *Leftwich v. Royal Ins. Co.*, 91 Md. 597, 612, 46 Atl. Rep. 1010; *Hanover Ins. Co. v. Johnson*, 26 Ind. App. 122, 57 N. E. Rep. 277; *Maddox v. Dwelling-House Ins. Co.*, 56 Mo. App. 343; *Teutonia Ins. Co. v. Johnson*, Ark. , 82 S. W. Rep. 840.

2. *Palmer v. St. Paul Ins. Co.*, 44 Wis. 201; *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *American Ins. Co. v. Hazen*, 110 Pa. St. 530; *Springfield Ins. Co. v. Brown*, 128 Pa. St. 392, 18 Atl. Rep. 396; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; *Parker v. Middlesex Assur. Co.*, 179 Mass. 528, 61 N. E. Rep. 215; *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. Rep. 839; *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N. W. Rep. 647.

3. *American Ins. Co. v. Hazen*, *supra*; *Parker v. Middlesex Assur. Co.*, *supra*.

4. *Insurance Co. v. Boykin*, 12 Wall. (U. S.) 433.

5. See Rule 13.

6. *Sherwood v. Agricultural Ins. Co.*, 10 Hun, 595, *affd.*, 73 N. Y. 447, on other grounds. And see *Blakely v. Phoenix Ins. Co.*, 20 Wis. 205; *Scammon v. Germania Ins. Co.*, *supra*.

RULE 5.

Mailing Statement in Prescribed Time but not Received in Such Time.

The assured must deliver to the company or its authorized agent proofs of loss within the prescribed time of sixty days when so limited in terms by the policy; mailing within such time but not received until after its expiration does not comply with the condition and prevents recovery of the insurance.

Peabody v. Satterlee, 166 N. Y. 174, 59 N. E. Rep. 818, 52 L. R. A. 956; *Lake Geneva Ice Co. v. Selvage*, 36 Misc. 212, 73 N. Y. Supp. 193. And see *Maddox v. Dwelling-House Ins. Co.*, 56 Mo. App. 343; *Huse Ice Co. v. Wielar*, 86 N. Y. Supp. 24 (App. T.); *Perry v. Caledonian Ins. Co.*, App. Div. , 93 N. Y. Supp. 50.

RULE 6.

Distinction Between Failure to Furnish in Time and Defects in Form.

A failure to furnish proofs or statement within time required stands upon different ground from failure to furnish same in due form. The latter defect may be remedied, but the former, if insisted upon, is fatal to the insured. The silence of the company upon a defect of form might be injurious to the assured, since, if notified, he can save himself by proper correction; but a failure to serve at all in time leaves him at the mercy of the company, and to point out to him the fact will not aid him in the least to remedy such defect. The omission to point out such defect is, therefore, no wrong or want of good faith to him, nor is the company under any legal obligation to do so.

Cook v. North British & M. Ins. Co., 181 Mass. 101, 62 N. E. Rep. 1049.

RULE 7.**When Statement or Proof Required Forthwith.**

When policy requires the furnishing of the statement or proofs of loss "forthwith," a delay of sixty-eight days in furnishing same cannot be regarded as "forthwith" when there is no reasonable excuse;¹ due and reasonable diligence, according to the circumstances, is what is required, and it is ordinarily a question of fact.²

1. *Cook v. North British & M. Ins. Co.*, 181 Mass. 101, 66 N. E. Rep. 597, 62 N. E. Rep. 1049; subsequent appeal, 183 Mass. 50, 66 N. E. Rep. 597.

2. *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 41 N. E. Rep. 658, 25 Ins. L. J. 124.

RULE 8.**Question of Due Diligence.**

When there is no dispute as to the facts, question of due diligence is one of law for the court.

Parker v. Middlesex Assur. Co., 179 Mass. 528, 61 N. E. Rep. 215.

RULE 9.**When Time not Essence of the Contract.**

Unless the policy provides a forfeiture or makes the service of proofs of loss within a time specified therein a condition precedent to the liability of the company the time within which proofs are required to be furnished is not of the essence of the contract. Where no forfeiture is provided, and service within specified time is not made a condition precedent, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until proofs

are furnished, but unless otherwise provided, expressly or by fair implication, it is not important that the proofs be not in fact served within the time stated in the policy.

Mason v. St. Paul F. & M. Ins. Co., 82 Minn. 336, 85 N. W. Rep. 13. See Rule 10.

RULE 10.

Modification of Rule 2 — Effect of not Furnishing Proof in Prescribed Time.

Rules 2 and 4 do not prevail in some States where the rule is that failure to furnish the statement or proof within the prescribed time does not operate as a forfeiture nor defeat ultimate recovery by the insured, the policy not declaring the insurance *void* in *that* event, but doing so in others; that the only effect of not furnishing the statement or proof within the prescribed time is to postpone the time for payment of the loss.

Southern Ins. Co. v. Knight, 111 Ga. 622, 624, 36 S. E. Rep. 821; *Welch v. Fire Assoc.*, Wis. , 98 N. W. Rep. 227; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. Rep. 773; *Continental Ins. Co. v. Whitaker*, Tenn. , 79 S. W. Rep. 119; *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228; *Hartford Ins. Co. v. Redding*, Fla. , 37 So. Rep. 62; *Munson v. German-American Ins. Co.*, W. Va. , 47 S. E. Rep. 160; *St. Paul F. & M. Ins. Co. v. Owens*, Kans. , 77 Pac. Rep. 544; *Flatley v. Phoenix Ins. Co.*, 95 Wis. 618, 70 N. W. Rep. 828; *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112, 51 N. W. Rep. 1122; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. Rep. 514; *Rynalski v. Insurance Co. of Pa.*, 96 Mich. 395, 55 N. W. Rep. 981, 23 Ins. L. J. 43; *Allen v. Milwaukee Mechanics' Ins. Co.*, 106 Mich. 204, 64 N. W. Rep. 15; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302; *Hall v. Concordia Ins. Co.*, 90 Mich. 403; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562, 23 Ins. L. J. 391; *Northern Assur. Co. v. Hanna*, 60 Nebr. 29, 82 N. W. Rep. 97; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. Rep. 882; *German Ins. Co. v. Brown (Ky.)*, 29 S. W. Rep. 313; *Orient Ins. Co. v. Clark (Ky.)*, 59 S. W. Rep. 863; *American Central Ins. Co. v. Heavenin (Ky.)*, 35 S. W. Rep. 922; *Taber v. Royal Ins. Co.*, 124 Ala. 681, 26 So. Rep. 252; *Rheims v. Standard Ins. Co.*, 39 W. Va. 672, 20 S. E. Rep. 670, 24 Ins. L. J. 253; *Burlington Ins. Co. v. Toby*, 10 Tex. Civ. App. 425, 30 S. W. Rep.

1111. And see *Sun Ins. Co. v. Mattingly*, 77 Tex. 162, 13 S. W. Rep. 1016; same principle applied to a notice of loss, see *Coventry Ins. Assoc. v. Evans*, 102 Pa. St. 281. It is a singular fact that the reasoning of the opinions in the preceding cases is frequently sustained by reference to a New York case (*Carpenter v. German-American Ins. Co.*, 52 Hun, 249). But the material fact or distinction frequently overlooked is that the policy in that case did *not* limit the time for furnishing of proofs (*Carpenter v. German-American Ins. Co.*, 52 Hun, 251). The case was affirmed, 135 N. Y. 298, 303, upon the reasoning that under the specific language the assured was entitled to "reasonable time." And see *Eureka Ins. Co. v. Gray*, 24 Ohio Cir. 268.

RULE 11.

When Time Prescribed Expires on Sunday.

Where the time for furnishing proofs of loss as limited and prescribed by the policy expires on a Sunday, and that day is excluded in the computation of time under the general provisions of a statute, the assured has the whole of the next day (Monday) to deliver the proofs to the company.

McKibban v. Des Moines Ins. Co., 114 Iowa, 41, 86 N. W. Rep. 38.

RULE 12.

Presumption from Mailing — Delivery.

Mailing of the statement or proof of loss in an envelope properly addressed and stamped creates a presumption that same was *received* in due course of mail; but this presumption *ceases* as soon as the contrary appears or is established;¹ the statement or proof of loss must be *both* mailed and *received within* the prescribed time;² but the rule as to necessity of receipt within the prescribed time is otherwise in many states;³ arrival at post-office where insurance company is located may

be sufficient if in time, although not actually delivered until the following day.⁴

1. *Dade v. Ætna Ins. Co.*, 54 Minn. 336, 56 S. W. Rep. 48, 22 Ins. L. J. 874. And see *Killips v. Putnam Ins. Co.*, 28 Wis. 472; *Bell v. Lycoming Ins. Co.*, 19 Hun, 238; *Hodgkins v. Montgomery Ins. Co.*, 34 Barb. 213.

2. *Peabody v. Satterlee*, 166 N. Y. 174, revg. 36 App. Div. 426, 55 N. Y. Supp. 363.

3. *Manufacturers & Merchants' Ins. Co. v. Zeitinger*, 168 Ill. 286, 48 N. E. Rep. 179, affg. 68 Ill. App. 268. And see Rules 9 and 10 and cases thereunder.

4. *Caldwell v. Dwelling-House Ins. Co.*, 61 Mo. App. 4.

RULE 13.

When Insured is Dead.

It is the duty of the insured or his legal representatives in event of his death to be diligent in some effort to comply with the clause in furnishing the statement or proof of loss; if effort is made and proves insurmountable for a time, delay may be excused and performance at earliest practicable moment may be sufficient; to excuse nonperformance it must appear that the act required could not by any reasonable means have been accomplished; difficulty of performance is not enough.

Matthews v. American Central Ins. Co., 154 N. Y. 449, 48 N. E. Rep. 751, affg. 9 App. Div. 339, 41 N. Y. Supp. 304.

RULE 14.

Delivery of Proofs to Company or Agent.

Delivery of proofs to home office of the company or to its officers¹ or a general agent² having authority over the matter of adjustment and payment of losses in the territory or department in which fire occurs, or

to a special agent or adjuster having authority in connection with the particular fire or loss,³ is delivery to the company; but as to a local agent who issued the policy there should ordinarily be some evidence as to authority besides the mere fact that he was the agent who issued the policy;⁴ when policy requires their being furnished to a particular agent or at a particular place, they should be so furnished;⁵ otherwise delivery to an authorized agent is sufficient.

1. *Trustees v. Brooklyn Ins. Co.*, 18 Barb. 69.

2. *Insurance Co. of N. A. v. McLimans*, 28 Nebr. 653, 44 N. W. Rep. 991.

3. *Merchants' Ins. Co. v. Vining*, 67 Ga. 661. See Rule 49.

4. See Rules 15 and 35.

5. *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644. And see *Walker v. Beecher*, 15 Misc. 149, 36 N. Y. Supp. 470; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. Rep. 952. And see "Adjuster and Adjustment."

RULE 15.

Authority of Local Agent.

Where there is no limitation on the face of the policy, or otherwise brought to the notice or knowledge of the assured limiting the authority of a local agent, if he has apparent authority by custom to receive proofs of loss, a delivery of same to him is a delivery to the company;¹ and in Pennsylvania may be served on the local agent who countersigned the policy under a statute.²

1. *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 41 N. E. Rep. 658, 25 Ins. L. J. 124; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. Rep. 207; *Greenlee v. Hanover Ins. Co.*, 104 Iowa, 481, 73 N. W. Rep. 1050.

2. *Welsh v. London Assur. Co.*, 151 Pa. St. 607, 25 Atl. Rep. 142, 22 Ins. L. J. 94; *Oswalt v. Hartford Ins. Co.*, 175 Pa. St. 427, 34 Atl. Rep. 735. See Rule 14.

RULE 16.

Insured Must Furnish the Proofs — Exceptions.

While the insured must *always*, whenever it is *possible*, make, sign, swear to, and furnish the statement or proof of loss, under special and exceptional circumstances, such as nonresidence, death, absence, insanity, and illness where it is *impossible* for him to do so, it may be signed and sworn to by an agent having charge of the business, property, or insurance,¹ or party to whom loss payable, where person really intended by the insurance company, under special circumstances, as the insured² mortgagee to whom loss payable, and "mortgagee clause," when owner refuses or unable;³ if insured be dead, his executor named in will or administrator, even before probate or issue of letters,⁴ or any of his legal representatives, which might be construed to mean not only executors and administrators, but heirs, next of kin, legatees, or devisees;⁵ in case of a partnership, the signing and oath by one of the partners is sufficient,⁶ or by any one who is the "insured" or legal representative as successor to a trustee or assignee with consent of the company,⁷ may be furnished by a receiver in bankruptcy under specific authority from the court.⁸

1. *Lumbermen's Mutual Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. Rep. 130; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939. 42 S. E. Rep. 269; *German Ins. Co. v. Grunert*, 112 Ill. 68; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. Rep. 1048; *Burns v. Michigan Manufacturers' Ins. Co.*, 130 Mich. 561, 90 N. W. Rep. 411; *Sims v. State Ins. Co.*, 47 Mo. 54; *O'Connor v. Hartford Ins. Co.*, 31 Wis. 160; *People v. Liverpool, L. & G. Ins. Co.*, 2 T. & C. 268, 273. And see *Find-eisen v. Metropole Ins. Co.*, 57 Vt. 520; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Swan v. Liverpool, L. & G. Ins. Co.*, 52 Miss. 704; *Burge v. Greenwich Ins. Co.*, Mo. App. , 80 S. W. Rep. 342; *Pearlatine v. Westchester Ins. Co.*, S. C. , 49 S. E. Rep. 4.

2. *Warren v. Springfield F. & M. Ins. Co.*, 13 Tex. Civ. App. 466, 35 S. W. Rep. 810; *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kans. App. 225, 44 Pac. Rep. 35.

3. *Graham v. Firemen's Ins. Co.*, 8 Daly, 421; *Southern Home B. & L. Assoc. v. Home Ins. Co.*, 94 Ga. 170, 21 S. E. Rep. 375, 24 S. E. Rep. 396; *Lombard Investment Co. v. Dwelling-House Ins. Co.*, 62 Mo. App. 315. And see *Nickerson v. Nickerson*, 80 Me. 100; *State Ins. Co. v. Ketcham*, 9 Kans. App. 552, 58 Pac. Rep. 229. And see "Mortgagor and Mortgagee."

4. *Matthews v. American Central Ins. Co.*, 9 App. Div. 339, 344, 41 N. Y. Supp. 304, *affd.*, 154 N. Y. 449; *Meyerson v. Hartford Ins. Co.*, 16 Misc. 286, 38 N. Y. Supp. 112.

5. *Matthews v. American Central Ins. Co.*, *supra*. And see *Farmers' Ins. Co. v. Graybill*, 74 Pa. St. 17.

6. *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. Rep. 453. And see *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. Rep. 921; *Marthinson v. North B. & M. Ins. Co.*, 64 Mich. 372, 31 N. W. Rep. 291.

7. *Wolcott v. Sprague*, 55 Fed. Rep. 545; *Cornell v. Le Roy*, 9 Wend. 163; *De Witt v. Agricultural Ins. Co.*, 89 Hun, 229, 36 N. Y. Supp. 570. And see "Mortgagor and Mortgagee."

8. *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804.

It is not clear, in New York, as to when or under what circumstances statement or proof of loss may be made and furnished by a mortgagee or party to whom the loss is payable. It has been twice decided by the lower courts that under exceptional circumstances they may be so furnished. *Armstrong v. Agricultural Ins. Co.*, 56 Hun, 399; *Moore v. Hanover Ins. Co.*, 71 Hun, 199. Both of these cases were reversed by the Court of Appeals (130 N. Y. 560, 141 N. Y. 219), without passing upon or deciding this point expressly. In the *absence of a mortgagee clause*, the opinion of the Court of Appeals in *Moore v. Hanover Ins. Co.*, 141 N. Y. 219, would seem to be adverse to the right of any other than the assured to make and swear to the proofs. And that it may be impossible for a mere appointee to receive the loss, to comply with the condition is recognized by the Court of Appeals in *Graham v. Phoenix Ins. Co.*, 77 N. Y. 171, 177. Of course, when the policy is issued to and covers *both* interests, *both* are the insured, so either may, under such circumstances, make the proofs. *Graham v. Phoenix Ins. Co.*, 17 Hun, 156. Whenever the mortgagee's interest is insured, or whenever he procures the insurance solely for his own benefit, without privity or authority of the owner

and mortgagor, although policy may in *form* be issued to and in name of latter as the assured, with loss payable to the mortgagee, the company knowing the facts, the mortgagee, being substantially the party solely insured, may make the proofs. *Pratt v. New York Central Ins. Co.*, 55 N. Y. 505. This case, however, would seem to have been really decided upon a question of waiver, as the proofs were made out as directed by company's officers, and were retained without objection. See and compare *Graham v. Phoenix Ins. Co.*, 77 N. Y. 171, *supra*. See also "Mortgagor and Mortgagee."

RULE 17.

Duty of Mortgagee.

Unless the mortgagee clause attached makes it obligatory on the mortgagee to furnish proofs of loss, he is not required to furnish such proofs as a condition precedent to his right of action on the policy; the failure of the mortgagor and owner to furnish such proofs, either wholly or within the stipulated time, constitutes one of the neglects, from the invalidating consequences of which the mortgagee is exempted.

Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. Rep. 473; *Northern Assur. Co. v. Chicago B. & L. Assoc.*, 98 Ill. App. 152, *affd.*, 198 Ill. 474, citing *Queen Ins. Co. v. Dearborn Savings Assoc.*, 175 Ill. 115.

This rule is probably operative in those States only which have adopted the exceptional rule of construction that the mortgagee clause, when attached, is operative only to the extent that it incorporates and specially includes in it the conditions of the policy. See "Mortgagor and Mortgagee." In Missouri the rule is held otherwise so far as the obligation to furnish proofs of loss is concerned. See *Lombard Investment Co. v. Dwelling-House Ins. Co.*, 62 Mo. App. 315. And see *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. Rep. 463, 22 Ins. L. J. 310.

RULE 18.**Attaching Creditor.**

An attaching creditor by obtaining testimony of assured and others may substantially comply with the condition requiring proofs.

Northwestern Ins. Co. v. Atkins, 66 Ky. 328.

RULE 19.**When Policy Taken Out for Benefit of Insured and Other Owners.**

Where the policy is taken out in name of one person or party for benefit of himself and other owners, it is not necessary for all to join in the proof of loss.

Walsh v. Washington Ins. Co., 32 N. Y. 427.

RULE 20.**When Loss Made Payable to a Third Party.**

When loss is merely made payable to a third party, the assured must make and furnish the statement or proofs of loss.

State Ins. Co. v. Maackens, 38 N. J. L. 565; *Spooner v. Vermont Ins. Co.*, 53 Vt. 156. And see *Moore v. Hanover Ins. Co.*, 141 N. Y. 219, and Rule 16.

RULE 21.**Substantial Compliance Sufficient.**

Substantial compliance with the clause in reference to the statement or proof of loss, as nature of the case and circumstances will admit, is all that is required;¹ for instance, the number and weight of bales of cotton and value in the aggregate;² statement that no per-

son other than insured had any interest, equivalent of assertion of no incumbrance;³ names of other companies and amounts of their several policies may be sufficient, without *copies*, unless specifically required;⁴ an itemized statement of the value and loss should be given, if possible, and in power of the insured;⁵ as to cause or origin of the fire it is sufficient, if not known, to say that it is unknown, but that it was not caused by the insured or by his procurement;⁶ or assured may state his information;⁷ while proper it is not necessary for the assured to apportion the loss.⁸

1. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. Rep. 366; *Jones v. Mechanics' Ins. Co.*, 36 N. J. L. 29; *Willis v. Germania Ins. Co.*, 79 N. C. 285; *McLaughlin v. Washington Ins. Co.*, 23 Wend. 525; *Bumstead v. Dividend Ins. Co.*, 12 N. Y. 81; *Boyle v. Hamburg-Bremen Ins. Co.*, 169 Pa. St. 349; *McManus v. Western Assur. Co.*, 22 Misc. 269; *Willis v. Germania Ins. Co.*, 79 N. C. 285; *Dyer v. Des Moines Ins. Co.*, 103 Iowa, 524; *Peet v. Dakota Ins. Co.*, 1 S. D. 462, 47 N. W. Rep. 532; *De Raiche v. Liverpool, L. & G. Ins. Co.*, 83 Minn. 398, 86 N. W. Rep. 425; *Robinson v. Palatine Ins. Co.*, N. M. , 66 Pac. Rep. 535; *Nixon v. Queen Ins. Co.*, 23 Can. S. C. 26; *Billmyer v. Hamburg-Bremen Ins. Co.*, W. Va. , 49 S. E. Rep. 901.

2. *Ætna Ins. Co. v. People's Bank*, 62 Fed. Rep. 222, 106 C. C. A. 342, 23 Ins. L. J. 807.

3. *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, *affd.* without opinion, 157 N. Y. 685.

4. *Spofford Bros.' Dry Goods v. American Central Ins. Co.*, 76 Mo. App. 27; *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. Rep. 33, 26 Ins. L. J. 963; *Wicking v. Citizens' Mutual Ins. Co.*, 118 Mich. 640, 77 N. W. Rep. 275, 28 Ins. L. J. 220. And see *Miller v. Hartford Ins. Co.*, 70 Iowa, 704; *Towne v. Springfield Ins. Co.*, 145 Mass. 582; *Blakely v. Phoenix Ins. Co.*, 20 Wis. 205; *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578.

5. *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347; *Gottlieb v. Dutchess County Ins. Co.*, 89 Hun, 36, 35 N. Y. Supp. 710; *Beatty v. Lycoming Ins. Co.*, 66 Pa. St. 9.

6. *Howard Ins. Co. v. Hocking*, 115 Pa. St. 415; *Warshawky v. Anchor Ins. Co.*, 98 Iowa, 221. And see *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

7. *White v. Royal Ins. Co.*, 149 N. Y. 485.

8. *Fuller v. Detroit Ins. Co.*, 36 Fed. Rep. 469.

When the statement is signed by the insured, and his oath certified by the notary, it is not essential that the insured should also sign the affidavit or verification. *McManus v. Western Assur. Co.*, 43 App. Div. 550, *affd.* without opinion, 167 N. Y. 602.

RULE 22.

When Policy Insures Party on Property in Possession or for which Liable.

When policy insures a carrier or other party on property in possession or for which he may be liable, it is sufficient to annex to the statement the names of the owners of property lost, the value of such property, and damages sustained by each so far as possible.

Force v. St. Paul F. & M. Ins. Co., 81 App. Div. 633, 80 N. Y. Supp. 708.

RULE 23.

Provision as to Statement of Other Insurance.

The requirement that all other insurance shall be stated, whether valid or not, *does not* require the statement of mere propositions for insurance unaccepted.

Partridge v. Milwaukee Mechanics' Ins. Co., 13 App. Div. 519, 43 N. Y. Supp. 632, *affd.* without opinion, 162 N. Y. 597.

RULE 24.

Carpenter's Bill or Statement not a Substitute or Compliance.

A bill or statement prepared by carpenters, stating the cost of rebuilding a building destroyed by the fire,

is not a sufficient statement or proof of loss;¹ unless by special terms in the policy it is made such.²

1. *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 96 Iowa, 224, 64 N. W. Rep. 769, 25 Ins. L. J. 392; *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

2. *Summerfield v. Phoenix Ins. Co.*, 65 Fed. Rep. 292.

RULE 25.

Statement or Proof of Stocks of Merchandise — Actual Cash Value Should be Stated.

The statement or proof of loss need not give specific items of goods or stock insured and destroyed, when it is not possible to do so; it may be sufficient to give amount of stock on hand at certain date with amounts of purchases subsequently, and amount of sales less deduction of a certain percentage representing profits;¹ and an itemized statement is not required wherever goods or property is absolutely destroyed, and it is not practicable or possible to make one;² but the actual cash value should be stated and not left to be inferred.³

1. *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. Rep. 33, 26 Ins. L. J. 963.

2. *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, affd. without opinion, 157 N. Y. 685.

3. *Brock v. Des Moines Ins. Co.*, 96 Iowa, 39, 64 N. W. Rep. 685. See Amount of Loss or Damage, Rule 21.

RULE 26.

Statement Limited to Particulars Called for by the Policy.

The statement or proof of loss need not give information or particulars not specifically provided for.

De Raiche v. Liverpool, L. & G. Ins. Co., 83 Minn. 398, 86 N. W. Rep. 425.

RULE 27.

When Insured Holds More than One Policy of Same Company.

When assured holds more than one policy of the same company, covering same property, he is not required to furnish more than one statement or proof of loss.

Dakin v. Liverpool, L. & G. Ins. Co., 13 Hun, 122, *affd.*, 77 N. Y. 600.

RULE 28.

Conditions Operative Only when Required are Independent of the Statement or Proof of Loss.

Such clauses or conditions which only come into force or operation on being "required," like that relating to the certificate of a notary or magistrate,¹ or copies of bills or invoices,² are independent of the clause relating to the statement or proof of loss; a demand for a notary's certificate is not a demand for amended proof of loss, nor does a mere objection that statement furnished does not contain the certificate amount to a "requirement of the certificate;" such a certificate is no part of the proof of loss, and it need not be furnished with or annexed to the proof or statement of loss.

1. *Merchants' Ins. Co. v. Gibbs*, 56 N. J. L. 679, 29 Atl. Rep. 485, 23 Ins. L. J. 791; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 390.

2. *Ætna Ins. Co. v. McLead*, 57 Kans. 95, 45 Pac. Rep. 73, 25 Ins. L. J. 669.

RULE 29.

Statements Refer to Date of Fire.

Statements refer to date of fire and not to date of proofs, although in present tense.

Wicking v. Citizens' Mut. Ins. Co., 118 Mich. 640, 77 N. W. Rep. 275, 28 Ins. L. J. 220. And see *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578.

RULE 30.

Effect of Overestimate of Value.

An over-estimate as to value does not defeat the claim to the insurance unless intentionally fraudulent.

Vergeront v. German Ins. Co., 86 Wis. 425, 56 N. W. Rep. 1096, 23 Ins. L. J. 236. And see "Fraud or False Swearing."

RULE 31.

In Case of a Reinsurance Policy.

In case of a reinsurance policy the condition in regard to the statement or proof of loss may be complied with by the reinsured company transmitting to the other the proofs made by the original assured;¹ but if there is a clause in the reinsurance policy that it is made subject to same risks, valuations, conditions, and mode of settlement as are or may be adopted or assumed by the reinsured company, it dispenses with preliminary proof, and binds the company to the adjustment made with the original assured, so far as the amount of loss is concerned.²

1. *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359. And see *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. Rep. 897.

2. *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59.

RULE 32.

When Building a Total Loss in Pennsylvania.

In Pennsylvania, where a building is a total loss, a particular statement or proof of loss as to amount or value is not required;¹ but may be required as to statement of other facts called for by the condition.²

1. *Farmers' Ins. Co. v. Moyer*, 97 Pa. St. 441; *Pennsylvania Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Universal Ins. Co. v.*

Weiss, 106 Pa. St. 20, 23 Atl. Rep. 991; *Home Ins. Co. v. Davis*, 98 Pa. St. 280; *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398; *Weiss v. American Ins. Co.*, 148 Pa. St. 349, 23 Atl. Rep. 991; *McGonigle v. Susquehanna Ins. Co.*, 168 Pa. St. 1, 31 Atl. Rep. 868, 24 Ins. L. J. 808.

2. *German-American Ins. Co. v. Hocking*, *supra*. And see *Powell v. Agricultural Ins. Co.*, 2 Pa. Sup. Ct. 151.

RULE 33.

Statements in Proofs not Evidence of Amount of Loss.

The statements in the statement or proof of loss do not themselves become evidence of the facts or extent of the loss;¹ and proofs of loss cannot be objected to, when offered in evidence of compliance with the condition, upon the ground that they contain untrue statements.² But a schedule of the property attached may be used upon a trial, in connection with the testimony of the insured, to refresh his recollection.³

1. *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. Rep. 33, 26 Ins. L. J. 963; *Cummins v. German-American Ins. Co.*, 192 Pa. St. 359, 43 Atl. Rep. 1016; *Rosenberg v. Fireman's Fund Ins. Co.*, 209 Pa. St. 336, 56 Atl. Rep. 671; *Newmark v. London & L. Ins. Co.*, 30 Mo. 160; *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Citizens' Ins. Co. v. Doll*, 35 Md. 89; *Hiles v. Hanover Ins. Co.*, 65 Wis. 585; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Edgerley v. Farmers' Ins. Co.*, 48 Iowa, 644; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *Southern Ins. Co. v. Lewis*, 42 Ga. 587; *Home Ins. Co. v. National Bank*, 88 Tenn. 369, 12 S. W. Rep. 915; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Moadinger v. Mechanics' Ins. Co.*, 2 Hall, 527; *Sexton v. Montgomery Ins. Co.*, 9 Barb. 191; *Cascade Ins. Co. v. Journal Publishing Co.*, 1 Wash. 452; *Tucker v. Colonial Ins. Co.*, W. Va. , 51 S. E. Rep. 86.

2. *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. Rep. 712.

3. *Wooldridge v. German Ins. Co.*, 69 Mo. App. 413; *Names v. Union Ins. Co.*, 104 Iowa, 612, 74 N. W. Rep. 14. And see *Coleman v. Association*, 77 Minn. 31; *Cheever v. Scottish Union Ins. Co.*, 86 App. Div. 328, 83 N. Y. Supp. 730.

RULE 34.

Insured not Estopped or Bound by his Statements in Proofs.

The insured is not bound or estopped by his statements in the statement or proof of loss, either as to value or extent of the loss or otherwise; mistake or actual facts may at any time subsequently be claimed or established, even down to the trial of an action brought to recover the insurance,¹ but statements may be evidence against him;² but as an admission a necessary fact to sustain a defense will not be assumed by construction;³ nor can the company take advantage of a misstatement caused by fault of its own adjuster.⁴

1. *Bentley v. Standard Ins. Co.*, 40 W. Va. 729, 23 S. E. Rep. 584; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401; *Ætna Ins. Co. v. Strout*, 16 Ind. App. 160, 44 N. E. Rep. 934; *Corkery v. Security Ins. Co.*, 99 Iowa, 382, 68 N. W. Rep. 792, 26 Ins. L. J. 331; *Names v. Union Ins. Co.*, 104 Iowa, 612, 74 N. W. Rep. 14; *Knop v. National Ins. Co.*, 101 Mich. 359, 59 N. W. Rep. 653, 24 Ins. L. J. 65; *Connecticut Ins. Co. v. Schwenk*, 94 U. S. 593; *Mead v. American Ins. Co.*, 13 App. Div. 476, 43 N. Y. Supp. 334; *Miaghan v. Hartford Ins. Co.*, 24 Hun, 58; *White v. Royal Ins. Co.*, 8 Misc. 613, 29 N. Y. Supp. 323; *Frankfurter v. Home Ins. Co.*, 6 Misc. 49, 26 N. Y. Supp. 81; *Parmalee v. Hoffman Ins. Co.*, 54 N. Y. 193; *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; *Rockey v. Firemen's Ins. Co.*, 83 App. Div. 638, 82 N. Y. Supp. 120; *Smiley v. Citizens' Ins. Co.*, 14 W. Va. 33; *Cook v. Lion Ins. Co.*, 67 Cal. 368; *Hanover Ins. Co. v. Lewis*, 28 Fla. 299, 10 So. Rep. 297; *Schmidt v. Mutual Ins. Co.*, 55 Mich. 432; *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28; *Waldeck v. Springfield Ins. Co.*, 53 Wis. 129; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464.

2. *New York Central Ins. Co. v. Watson*, 23 Mich. 486; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Antes v. Western Ins. Co.*, 84 Iowa, 355, 51 N. W. Rep. 7; *Insurance Co. of N. A. v. Zaenger*, 63 Ill. 462, 467; *Insurance Co. v. Newton*, 22 Wall.

(U. S.) 32, 35; *Mosley v. Vermont Ins. Co.*, 55 Vt. 142; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31, 35; *Hennesy v. Niagara Ins. Co.*, 8 Wash. 91, 35 Pac. Rep. 585, 23 Ins. L. J. 796.

3. *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; *Cumberland Ins. Co. v. Giltinan*, 19 Vroom (N. J.), 495. And see *Hanover Ins. Co. v. Parrotte*, 47 Nebr. 576, 66 N. W. Rep. 636.

4. *Star Union Lumber Co. v. Finney*, 35 Nebr. 214, 52 N. W. Rep. 1113.

RULE 35.

Waiver by Local Agent.

A local agent authorized to make contracts of insurance by issue of policies has no authority as such to waive proofs of loss;¹ but when same are furnished by the assured as suggested by the local agent who issued the policy, and are received and retained by the company and acted upon by it through an investigation by a special agent or adjuster, without objection, there is sufficient evidence of waiver;² and so where the adjuster or company makes the local agent the medium of communication with the assured, the latter's authority may become a question of fact;³ and so the authority of the local agent may become a question of fact where he is accustomed to receive and forward notices and proofs of loss;⁴ and delivery of proofs to a local agent may be sufficient to set the time running for exercise of option to replace or rebuild, etc.,⁵ and so delivery to local agent may be sufficient where not objected to and acted upon.⁶

1. *Shapiro v. St. Paul F. & M. Ins. Co.*, 61 Minn. 135, 63 N. W. Rep. 614, 24 Ins. L. J. 774; *Ermentraut v. Girard Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532, 31 S. W. Rep. 155, 25 Ins. L. J. 40; *Dwelling-House Ins. Co. v. Snyder*, 59 N. J. L. 18, 34 Atl. Rep. 931; *Ruthven v. American Ins. Co.*, 92 Iowa, 316, 60 N. W. Rep. 663, 24 Ins. L. J. 266; *Knudson v. Hekla Ins. Co.*, 75

Wis. 198, 43 N. W. Rep. 954; *Harrison v. Hartford Ins. Co.*, 59 Fed. Rep. 732, 23 Ins. L. J. 161; *McCollum v. North B. & M. Ins. Co.*, 65 Mo. App. 304; *Hicks v. British-America Assur. Co.*, 162 N. Y. 284, rev'g 13 App. Div. 444; *Bush v. Westchester Ins. Co.*, 63 N. Y. 531; *Van Allen v. Farmers' Ins. Co.*, 64 N. Y. 469; *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa, 229, 76 N. W. Rep. 696; *Smith v. Niagara Ins. Co.*, 60 Vt. 682, 15 Atl. Rep. 353; *Wadhams v. Western Assur. Co.*, 117 Mich. 514, 76 N. W. Rep. 6; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 51 N. W. Rep. 455; *Lohnes v. Insurance Co. of N. A.*, 121 Mass. 439; *Engebretson v. Hekla Ins. Co.*, 58 Wis. 301, 17 N. W. Rep. 5; *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich. , 98 N. W. Rep. 761; *Perry v. Caledonian Ins. Co.*, App. Div. , 93 N. Y. Supp. 50.

2. *Weber v. Germania Ins. Co.*, 16 App. Div. 596, 44 N. Y. Supp. 976. And see *Western Assur. Co. v. White*, Miss. , 25 So. Rep. 594; *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. Rep. 863.

3. *Bolan v. Fire Assoc.*, 58 Mo. App. 225; *Lycoming Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40; *Sergeant v. Liverpool, L. & G. Ins. Co.*, 155 N. Y. 349, 49 N. E. Rep. 935.

4. *Minneapolis & St. P. R. R. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. Rep. 132; *Van Allen v. Farmers' Ins. Co.*, 10 Hun, 397, affd. on opinion of lower court, 72 N. Y. 604; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 41 N. E. Rep. 658.

5. *Insurance Co. of N. A. v. Hope*, 58 Ill. 75.

6. *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. E. Rep. 207.

Exceptions.—Where there is no limitation shown upon the authority of the local agent, authorizing him to countersign and issue policies, and policy does not require proofs to be delivered to any one else such local agent may receive or waive proofs of loss.

McCollum v. Hartford Ins. Co., 67 Mo. App. 66, 76; *Nickell v. Phoenix Ins. Co.*, 144 Mo. 420, 46 S. W. Rep. 435, 27 Ins. L. J. 880; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606, 21 S. W. Rep. 207; *Harness v. National Ins. Co.*, 76 Mo. App. 410; *Burge v. Greenwich Ins. Co.*, Mo. App. , 80 S. W. Rep. 342; *Schloss v. Westchester Ins. Co.*, Ala. , 37 So. Rep. 701; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 So. Rep. 596; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. Rep. 46, 24 Ins. L. J. 447; *Phoenix Ins. Co. v. Munger*, Kans. , 30 Pac. Rep. 120; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E.

Rep. 779; *German Ins. Co. v. Stuart*, 13 Ind. App. 627, 42 N. E. Rep. 286; *Fire Assoc. v. Jones (Tex.)*, 40 S. W. Rep. 44; *Eastern R. R. Co. v. Relief Ins. Co.*, 105 Mass. 570; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905; *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228; *Stacy v. Norwich Union Soc.*, 25 Ohio Cir. 67; *Vesey v. Commercial Union Assur. Co.*, S. D. , 101 N. W. Rep. 1074.

RULE 36.

Local Agent May be Clothed with Apparent Authority.

In receiving and transmitting notices from the assured to the company, and in receiving communications from the company in respect thereto, and in investigating an alleged loss upon request of the company, a local agent, whatever his original authority, transacts the business for the company as its agent. While so engaged, his acts and representations are those of the company, and if his acts and conduct are inconsistent with an intention on the part of the company to insist upon a strict observance of the condition requiring the furnishing of proofs within the time prescribed, they become evidence of waiver of same.

Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. Rep. 355, affg. 99 Ill. App. 469.

RULE 37.

Defects not Specifically Pointed Out to Insured Waived.

If the statement or proof of loss furnished is objectionable the defect or defects must be specifically pointed out to the insured by the insurance company; if not thus pointed out they are waived;¹ and if thus specifically made it operates as a waiver of all other objections, which are not, but might have been made;² but not as a waiver of other defenses.³

1. *Sutton v. American Ins. Co.*, 188 Pa. St. 380, 41 Atl. Rep. 537; *Schmurr v. State Ins. Co.*, 30 Oreg. 29, 46 Pac. Rep. 363, 26 Ins. L. J. 373; *First Nat. Bank v. American Central Ins.*

Co., 58 Minn. 492, 60 N. W. Rep. 345, 24 Ins. L. J. 55; Rockford Ins. Co. v. Winfield, 57 Kans. 576, 47 Pac. Rep. 511; German Ins. Co. v. Gray, 43 Kans. 497, 23 Pac. Rep. 637; Faulkner v. Manchester Assur. Co., 171 Mass. 349, 50 N. E. Rep. 529; Virginia F. & M. Ins. Co. v. Goode, 95 Va. 762, 30 S. E. Rep. 370; Karelson v. Sun Fire Office, 45 Hun. 144, affd., 122 N. Y. 545; Merchants' Ins. Co. v. Reichman (Tex.), 40 S. W. Rep. 831; Firemen's Ins. Co. v. Floss, 67 Md. 403; Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. Rep. 683, 27 Ins. L. J. 893; Liverpool, L. & G. Ins. Co. v. Sorsby, 60 Miss. 302; Weed v. Hamburg-Bremen Ins. Co., 133 N. Y. 394, 31 N. E. Rep. 231; German Ins. Co. v. Gibson, 53 Ark. 494; Hartford Ins. Co. v. Meyer, 30 Nebr. 135, 46 N. W. Rep. 292; Argall v. Insurance Co., 84 N. C. 355; Pratt v. New York Central Ins. Co., 55 N. Y. 505; Hamilton v. Connecticut Ins. Co., 46 Fed. Rep. 42; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Badger v. Glens Falls Ins. Co., 49 Wis. 389; Planters' Ins. Co. v. Engle, 52 Md. 468; Phoenix Ins. Co. v. Tucker, 92 Ill. 64; State Ins. Co. v. Maackens, 9 Vroom (N. J.), 564. And see Cummer Lumber Co. v. Assoc. Mfrs. Ins. Co., 67 App. Div. 151, 73 N. Y. Supp. 668, affd., 173 N. Y. 633, without opinion; Billmyer v. Hamburg-Bremen Ins. Co., W. Va., 49 S. E. Rep. 901; Vesey v. Commercial Union Assur. Co., S. D., 101 N. W. Rep. 1074.

2. Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. Rep. 855, 26 Ins. L. J. 36; Western Home Ins. Co. v. Richardson, 40 Nebr. 1, 58 N. W. Rep. 597, 23 Ins. L. J. 501; Kuznik v. Orient Ins. Co., 73 Ill. App. 201; Robinson v. Palatine Ins. Co., N. M., 66 Pac. Rep. 535; Enos v. St. Paul Ins. Co., 4 S. D. 639, 57 N. W. Rep. 919, 23 Ins. L. J. 258; Fire Ins. Co. v. Felrath, 77 Ala. 194; Hanover Ins. Co. v. Lewis, 28 Fla. 209, 10 So. Rep. 297; Craighton v. Agricultural Ins. Co., 39 Hun, 319.

3. Armstrong v. Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. Rep. 991.

RULE 38.

Objections Must be Made Promptly.

The insurance company should make its objections, if any, to the statement or proof furnished, *promptly*, as otherwise delay may be evidence of waiver;¹ for instance, delay of twenty-three days² may be evidence of waiver; or thirty days³ and over, and even much less delay, may be evidence of waiver when the

company, having received the statement or proof of loss with opportunity to object before expiration of the prescribed time, omits to do so until after.⁴

1. *Welsh v. London Assur. Co.*, 151 Pa. St. 607, 25 Atl. Rep. 142, 22 Ins. L. J. 94; *Cummins v. German-American Ins. Co.*, 197 Pa. St. 61, 46 Atl. Rep. 902; *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353, 51 N. E. Rep. 977; *Home Ins. Co. v. Hammong*, 44 Nebr. 566, 62 N. W. Rep. 883, 24 Ins. L. J. 493; *Vergeront v. German Ins. Co.*, 86 Wis. 425, 56 N. W. Rep. 1096, 23 Ins. L. J. 236; *Alston v. Phoenix Ins. Co.*, 100 Ga. 287, 27 S. E. Rep. 981, 27 Ins. L. J. 77; *Dyer v. Des Moines Ins. Co.*, 103 Iowa, 524, 72 N. W. Rep. 68; *Probst v. American Central Ins. Co.*, 64 Mo. App. 408; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. Rep. 366; *Planters' Ins. Co. v. Deford*, 38 Md. 382, 404; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Swan v. Liverpool, L. & G. Ins. Co.*, 52 Miss. 704; *Mercantile Ins. Co. v. Holthouse*, 43 Mich. 423; *Firemen's Ins. Co. v. Floss*, 67 Md. 403; *Liverpool, L. & G. Ins. Co. v. Sorsby*, 60 Miss. 302; *German Ins. Co. v. Gray*, 43 Kans. 497, 23 Pac. Rep. 637; *Glazer v. Home Ins. Co.*, Misc. , 90 N. Y. Supp. 426.

2. *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, *affd.* without opinion, 157 N. Y. 685; *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578; *Capital Ins. Co. v. Wallace*, 48 Kans. 400, 29 Pac. Rep. 755.

3. *German Ins. Co. v. Hall*, 1 Kans. App. 43, 41 Pac. Rep. 69; *Carpenter v. Allemania Ins. Co.*, 156 Pa. St. 37, 26 Atl. Rep. 781, 22 Ins. L. J. 634; *Sutton v. American Ins. Co.*, 188 Pa. St. 380, 41 Atl. Rep. 537; *Dakin v. Liverpool, L. & G. Ins. Co.*, 13 Hun, 122.

4. *Dautel v. Pennsylvania Ins. Co.*, 65 Mo. App. 44; *Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. Rep. 761; *Deland v. Ætna Ins. Co.*, 68 Mo. App. 277.

RULE 39.

Insured Must Have Opportunity to Supply or Remedy Defects.

The objections, if any, to a statement or proof of loss should be pointed out within reasonable time so

that the assured can have opportunity to supply or remedy them *within limited time*, otherwise the company's delay may be evidence of waiver;¹ if assured has ample opportunity to furnish the statement required, there is no waiver.²

1. *Messner v. Niagara Ins. Co.*, 24 App. Div. 241, 48 N. Y. Supp. 478; *Moyer v. Sun Ins. Co.*, 176 Pa. St. 579, 35 Atl. Rep. 221; *Hibernia Ins. Co. v. Meyer*, 10 Vroom (N. J.), 482; *Ben Franklin Ins. Co. v. Flynn*, 98 Pa. St. 628; *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9; *Bartlett v. Union Ins. Co.*, 46 Me. 500; *Mercantile Ins. Co. v. Holthouse*, 43 Mich. 423, 5 N. W. Rep. 642.

2. *Riker v. Insurance Co. N. A.*, 90 App. Div. 391, 85 N. Y. Supp. 546.

RULE 40.

Insured Must Have Reasonable Time to Comply with Objections to Proofs.

When the company objects and demands further statement or proof, the assured has a reasonable time to comply therewith even although when furnished the limited or prescribed time (sixty days) has expired.

Cummins v. German-American Ins. Co., 192 Pa. St. 359, 43 Atl. Rep. 1016. And see *St. John v. German-American Ins. Co.*, Mo. App. , 82 S. W. Rep. 543.

RULE 41.

Company not Obligated to Return Proofs to Make Objections Effective.

The insurance company is not obliged to return papers purporting to be proofs to make its objections to same as such effective; rejection and objection by notice is sufficient, or return may be made with notice of rejection and objection as the company may determine;¹ but should return them to assured for correction when so requested.²

1. *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398, 406.

2. *Turley v. Insurance Co. of N. A.*, 25 Wend. 375; *Findeisen v. Metropole Ins. Co.*, 57 Vt. 520.

RULE 42.**Waiver of Written Extension of Time.**

The clause requiring written extension of time to furnish proofs may be waived.

Baumgartel v. Providence-Washington Ins. Co., 61 Hun, 118, 15 N. Y. Supp. 573, revd., 136 N. Y. 547, but on another question. It was held in *Missouri Pac. Ry. Co. v. Western Assur. Co.*, 129 Fed. Rep. 610 (U. S. Cir.), that a waiver of proofs must be in writing, but this case seems to be substantially overruled by *Phoenix Ins. Co. v. Kerr*, 129 Fed. Rep. 723, C. C. A. . See "Waiver."

RULE 43.**Company Under no Obligation to Furnish Blanks — Refusal not Construed as Waiver.**

The insurance company is under no obligation to furnish blank proofs of loss, and its mere refusal to do so cannot be construed as a denial of liability or as a waiver of proofs;¹ but duty to furnish such blanks may be imposed by statute;² and failure of the company to comply with the request for blanks operates as a waiver.³

1. *Continental Ins. Co. v. Dornian*, 125 Ind. 189, 25 N. E. Rep. 213; *Palmer v. Factors' Ins. Co.*, 33 La. Ann. 1336; *Birmingham v. Farmers' Ins. Co.*, 67 Barb. 595; *Fire Assoc. v. Masterson*, Tex. Civ. App. , 61 S. W. Rep. 962.

2. *Brounfield v. Mercantile Ins. Co.*, 84 Mo. App. 134.

3. *Myer v. Insurance Co. of N. A.*, 73 Mo. App. 166; *Brani-gan v. Jefferson Ins. Co.*, 102 Mo. App. 70, 76 S. W. Rep. 643.

RULE 44.**Waiver by Refusal to Adjust or Pay, Company Having the Policy.**

Where company has or obtains possession of the policy, refusal to adjust or pay waives proofs within certain time.

Norwich Union Ins. Soc. v. Girtton, 124 Ind. 217, 24 N. E. Rep. 984.

RULE 45.**Reference to Policy not Sufficient Objection.**

Where company receives a statement of a loss within proper time, with advice from the assured that he does not have access to the policy, which is not in his possession, and requesting, if not satisfactory, information as to what he should do, referring the assured to the policy is not a sufficient objection, and the company waives the condition both as to time and form.

Farmers' Ins. Co. v. Baker, 94 Md. 545, 51 Atl. Rep. 184.

RULE 46.**Effect of Refusal to Deliver Policy on Parol Contract.**

Where the assured depends upon a parol contract of insurance, and the company refuses to issue or deliver the policy, such refusal amounts to a denial of liability, and as a waiver of proofs;¹ but such denial and refusal by the local agent, having no authority to waive proofs, does not amount to such waiver.²

1. *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 221.

2. *Hicks v. British-American Ins. Co.*, 162 N. Y. 284, 56 N. E. Rep. 743.

RULE 47.**Effect of Adjustment or Agreement as to Amount of Loss.**

An adjustment or agreement as to amount of the loss is evidence of waiver of notice and proofs of loss.

Gerhart v. Northern Assur. Co., 86 Mo. App. 596.

Proofs may notwithstanding be required as they include other particulars. See Rule 1. It is customary to furnish them as evidence of agreement as to amount, and if not otherwise specially agreed, they are required to fix time for payment. See *Payment of the Loss*, Rules 1 and 3.

RULE 48.

Appraisal and Proofs of Loss Distinct and Separate—Waiver.

An appraisal and furnishing proofs of loss are entirely separate and distinct matters; the statement or proofs of loss not only relate to value, but call for information bearing otherwise on the liability of the company.¹ Mere request for appraisal coupled with specific demand for proofs, the assured having an opportunity to comply, does not operate as a waiver.² But an offer to pay amount of an award may be evidence of waiver of proofs,³ and such is the effect of a promise to pay it.⁴

1. *Fournier v. German-American Ins. Co.*, 23 R. I. 36, 49 Atl. Rep. 98. And see *Wicking v. Citizens' Ins. Co.*, 118 Mich. 640, 77 N. W. Rep. 275; *Prevost v. Scottish Union Ins. Co.*, Rap. Jud. Quebec, 14 C. S. 203.

2. *Hanna v. American Central Ins. Co.*, 36 Mo. App. 538. And see *McCollum v. Liverpool, L. & G. Ins. Co.*, 67 Mo. App. 66. See also "Appraisal;" "Waiver."

3. *McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112. And see *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. Rep. 904, 86 Md. 86, 37 Atl. Rep. 782, 27 Ins. L. J. 493.

4. *McGonigle v. Susquehanna Ins. Co.*, 168 Pa. St. 1, 31 Atl. Rep. 868, 24 Ins. L. J. 808.

It has been held that a demand for an appraisal waives proofs of loss. *Home Ins. Co. v. Bean*, 42 Nebr. 537, 60 N. W. Rep. 907, 24 Ins. L. J. 516; *Dee & Sons v. Key City Ins. Co.*, 104 Iowa, 167, 73 N. W. Rep. 594; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 80 N. W. Rep. 309; *Walker v. German Ins. Co.*, 51 Kans. 725, 33 Pac. Rep. 597; *Southern Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. Rep. 975, 27 Ins. L. J. 57; *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. Rep. 279, 27 Ins. L. J. 318.

No doubt appraisal may waive proofs in limited time (see Rule 62), but, as to waiver otherwise, see "Appraisal;" and "Waiver." Proofs having been once furnished need not be again after an award under appraisal. *Billmyer v. Hamburg-Bremen Ins. Co.*, W. Va. , 49 S. E. Rep. 901.

RULE 49.**Authority of Adjuster.**

An adjuster who calls upon and negotiates with the assured, as result of a notice of loss communicated through a local agent, has apparent authority to waive the statement or proof of loss, and to agree upon the amount of loss;¹ authority to adjust a loss includes authority to waive proof of loss;² but there should be some evidence of authority besides the naked fact that the person calls himself or is generally known as an adjuster.³

1. *Wholley v. Western Assur. Co.*, 174 Mass. 263, 54 N. E. Rep. 548, 28 Ins. L. J. 263; *St. Landry Mercantile Co. v. Teutonia Ins. Co.*, La. , 37 So. Rep. 967.

2. *Ruthven v. American Ins. Co.*, 102 Iowa, 550, 71 N. W. Rep. 574, 27 Ins. L. J. 593; *Liverpool, L. & G. Ins. Co. v. Tillis*, 110 Ala. 201, 17 So. Rep. 672; *California Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. Rep. 577; *Germania Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. Rep. 921; *Ætna Ins. Co. v. Shoyer*, 85 Ind. 362; *McCollum v. Liverpool, L. & G. Ins. Co.*, 67 Mo. App. 66.

3. *Hollis v. State Ins. Co.*, 65 Iowa, 454, 21 N. W. Rep. 774; *Slater v. Capital Ins. Co.*, 89 Iowa, 628, 57 N. W. Rep. 422; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. Rep. 373; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. Rep. 128; *German Ins. Co. v. Davis*, 40 Nebr. 700, 59 N. W. Rep. 698; *Mitchell v. Minnesota Ins. Co.*, 48 Minn. 278, 51 N. W. Rep. 608. And see *Atlas Ins. Co. v. Brownell*, 29 Can. S. C. 537; *Commercial Union Assur. Co. v. Hargeson*, 29 Can. S. C. 601. See also "Adjuster."

RULE 50.**Waiver by Adjuster.**

An adjuster or special agent of the insurance company authorized to investigate, or ascertain, adjust, and settle the loss, binds the company by a parol waiver of the statement or proof of loss; such waiver need not be evidenced in writing; the waiver clause in the

policy requiring written evidence is inapplicable or inoperative in such a case.

Smaldone v. Insurance Co. of N. A., 162 N. Y. 580, 57 N. E. Rep. 168, affg. 22 App. Div. 633 (no opinion); opinion on previous appeal, 15 App. Div. 232, 44 N. Y. Supp. 201; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. Rep. 606; *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa, 229, 76 N. W. Rep. 696; *Smith v. Continental Ins. Co.*, 108 Iowa, 382, 79 N. W. Rep. 126, 28 Ins. L. J. 924; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. Rep. 710; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. Rep. 1048, 25 Ins. L. J. 68; *Mix v. Royal Ins. Co.*, 169 Pa. St. 639, 32 Atl. Rep. 460; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. Rep. 382, 25 Ins. L. J. 610; *Powers v. New England Ins. Co.*, 68 Vt. 390, 35 Atl. Rep. 331; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Citizens' Ins. Co. v. Bland (Ky.)*, 39 S. W. Rep. 825, 40 S. W. Rep. 670, 26 Ins. L. J. 615; *McGuire v. Hartford Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300, affd. without opinion, 158 N. Y. 680; *Lowry v. Lancashire Ins. Co.*, 32 Hun, 329; *Titsworth v. American Central Ins. Co.*, 62 Mo. App. 310; *Young v. Ohio Farmers' Ins. Co.*, 92 Mich. 68, 52 N. W. Rep. 454; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. Rep. 433; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. Rep. 285; *American Ins. Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. Rep. 659; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 So. Rep. 596; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. Rep. 863; *Blake v. Exchange Ins. Co.*, 78 Mass. 265; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. Rep. 731.

Exception. — See *Wadhams v. Western Assur. Co.*, 117 Mich. 514, 76 N. W. Rep. 6, 27 Ins. L. J. 924; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302. And see "Adjuster and Adjustment," and "Waiver."

RULE 51.

Same Subject — Limitations and Nonwaiver Agreements.

A waiver of the statement or proof of loss or of defects therein is not prevented by a statement or de-

laration by the adjuster or company to effect "that nothing is waived;"¹ or in demanding further proof that "it does not thereby waive any defense it may have;"² and even an agreement between the adjuster and assured in general terms that in investigating or adjusting there is no waiver of legal rights or defenses or of terms and conditions of the policy, will not prevent such a waiver;³ but mere failure of an adjuster to keep an appointment with the assured is no evidence of waiver of proofs.⁴

1. *Summers v. Western Home Ins. Co.*, 45 Mo. App. 46.

2. *Granger v. Manchester Assur. Co.*, 119 Mich. 177, 77 N. W. Rep. 693, 28 Ins. L. J. 220.

3. *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. Rep. 683, 27 Ins. L. J. 893; *Millers' National Ins. Co. v. Jackson County Milling Co.*, 60 Ill. App. 224.

4. *Ervay v. Fire Assoc.*, 119 Iowa, 304, 93 N. W. Rep. 290. And see "Waiver."

RULE 52.

Denial of Liability as Waiver.

An unqualified denial of liability or assertion that policy is void waives statement or proof of loss;¹ and this effect is not prevented by a statute imposing an obligation to furnish proofs.²

1. *Lumbermen's Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. Rep. 130; *Northern Assur. Co. v. Chicago B. & L. Assoc.*, 98 Ill. App. 152, *affd.*, 198 Ill. 474; *Erie Ins. Co. v. Hill*, 99 Ill. App. 178; *Davidson v. Guardian Assur. Co.*, 176 Pa. St. 525, 35 Atl. Rep. 220; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 29 S. E. Rep. 245; *Caledonian Ins. Co. v. Traub*, 80 Md. 214; *Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. Rep. 761; *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 62 S. W. Rep. 145; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. Rep. 691, 24 Ins. L. J. 385; *Home Ins. Co. v. Gilson*, 72 Miss. 58, 17 So. Rep. 13, 24 Ins. L. J.

458; *McPike v. Western Ins. Co.*, 61 Miss. 37; *Liverpool, L. & G. Ins. Co. v. Tillis*, 110 Ala. 201, 17 So. Rep. 672; *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. Rep. 370; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. Rep. 267, 26 Ins. L. J. 384; *Orient Ins. Co. v. Clark (Ky.)*, 59 S. W. Rep. 863; *German Ins. Co. v. Frederick*, 58 Fed. Rep. 144, 7 C. C. A. 122; *Faust v. American Ins. Co.*, 91 Wis. 158, 64 N. W. Rep. 883, 25 Ins. L. J. 176; *Matthews v. Capital Ins. Co.*, 115 Wis. 272, 91 N. W. Rep. 675; *Liverpool, L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. Rep. 1006; *West v. Norwich Union Ins. Co.*, 10 Utah, 442, 37 Pac. Rep. 685; *Lum v. United States Ins. Co.*, 104 Mich. 397, 62 N. W. Rep. 562, 25 Ins. L. J. 53; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40; *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. Rep. 280, 838; *Bloom v. State Ins. Co.*, 94 Iowa, 359, 62 N. W. Rep. 810; *Soorholtz v. Marshall Ins. Co.*, 109 Iowa, 522, 80 N. W. Rep. 542; *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125; *Lansing v. Commercial Union Assur. Co.*, Nebr. , 93 N. W. Rep. 756; *Masæll v. Protective Mut. Ins. Co.*, 19 R. I. 565, 35 Atl. Rep. 209; *Flaherty v. Continental Ins. Co.*, 20 App. Div. 275, 46 N. Y. Supp. 934; *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kans. App. 527, 51 Pac. Rep. 567; *Trundle v. Providence-Washington Ins. Co.*, 54 Mo. App. 188; *Germania Ins. Co. v. Ashby*, 65 S. W. Rep. 611; *Liverpool, L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. Rep. 248; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. Rep. 285; *German Ins. Co. v. Seibert*, 24 Ind. App. 279, 56 N. E. Rep. 686; *Morrow v. Lancashire Ins. Co.*, 26 Ont. App. 173; *Sproul v. Western Assur. Co.*, 33 Oreg. 98, 54 Pac. Rep. 180, 28 Ins. L. J. 118; *Sun Mutual Ins. Co. v. Searles*, 73 Miss. 62, 18 So. Rep. 544; *Tayloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Fischer v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713; *Taylor v. Glens Falls Ins. Co.*, Fla. , 32 So. Rep. 887; *Home Ins. Co. v. Koob*, 113 Ky. 360, 68 S. W. Rep. 453, 24 Ky. L. Rep. 223; *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. Rep. 773; *Continental Ins. Co. v. Daniels*, 78 S. W. Rep. 866 (Ky.); *St. Landry Mercantile Co. v. Teutonia Ins. Co.*, La. , 37 So. Rep. 967; *Greenwich Ins. Co. v. State*, Ark. , 84 S. W. Rep. 1025; *Nicholas v. Iowa Merchants' Ins. Co.*, Iowa, , 101 N. W. Rep. 115; *Ohio Farmers' Ins. Co. v. Vogel*, Ind. App. , 73 N. E. Rep. 612; *Siegle v. Phoenix Ins. Co.*, Mo. App.

- , 81 S. W. Rep. 637; *Phoenix Ins. Co. v. Kerr*, 129 Fed. Rep. 723, C. C. A.
 2. *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325.

RULE 53.**Denial of Liability Must Extend to Entire Claim.**

A denial of liability to operate as a waiver of statement or proof of loss must extend to all claim under the policy; a denial of liability as to *a part* of goods destroyed does not waive the statement or proof in respect to other property.

Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kans. App. 527, 51 Pac. Rep. 567. And see *Commercial Ins. Co. v. Allen*, 80 Ala. 571.

RULE 54.**Denial of Liability Coupled with Demand for Proofs.**

Where liability is denied, but such denial is coupled with a demand for the statement or proof of loss, either at the same time,¹ or subsequently if assured has ample time to comply therewith,² it does not operate as a waiver.

1. *Phoenix Ins. Co. v. Minner*, 64 Ark. 590, 44 S. W. Rep. 75, 27 Ins. L. J. 423.
 2. *Hahn v. Guardian Assur. Co.*, 23 Oreg. 576, 32 Pac. Rep. 683. And see "Waiver."

RULE 55.**Denial of Liability Coupled with Disclaimer of Intention to Waive.**

A denial of liability operates as a waiver of the statement or proof of loss, notwithstanding it is coupled with a disclaimer of any intention to waive any condition of the policy.¹

1. *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Probst v. Insurance Co. of N. A.*, 64 Mo. App. 484.

RULE 56.**Question of Waiver as One of Fact or Law.**

The question of the waiver of the statement or proof of loss by a denial of liability is ordinarily one of fact, peculiarly one for determination of a jury;¹ but may be a question of law when the act which constitutes a

waiver is intentionally done, and is unequivocal in significance, without regard to the intention of the parties;² or where the facts are undisputed.³

1. *Robinson v. Pennsylvania Ins. Co.*, 90 Me. 385, 38 Atl. Rep. 320, 27 Ins. L. J. 36; *Arnold v. Hartford Ins. Co.*, 55 Mo. App. 149.

2. *Cooper v. Insurance Co. of Pa.*, 96 Wis. 362, 71 N. W. Rep. 606, 26 Ins. L. J. 985.

3. *Helvetia Swiss Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. Rep. 242.

RULE 57.

When Denial of Liability Operates as Waiver.

Where the statement or proof of loss is not furnished within the prescribed time, a subsequent refusal to pay is not a waiver;¹ it is the denial of liability during the time required for filing the statement or proof of loss that constitutes a waiver.²

1. *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *Brink v. Hanover Ins. Co.*, 70 N. Y. 593.

2. *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656, 66 N. W. Rep. 712, 25 Ins. L. J. 631; *State Ins. Co. v. School District*, 66 Kans. 77, 71 Pac. Rep. 272; *Deitz v. Providence-Washington Ins. Co.*, 33 W. Va. 526, 11 S. E. Rep. 50; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *German Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. Rep. 112; *Carson v. German Ins. Co.*, 62 Iowa, 433, 17 N. W. Rep. 650; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. Rep. 453; *Corycon v. Providence-Washington Ins. Co.*, 79 Mich. 187, 44 N. W. Rep. 431; *Mensing v. American Ins. Co.*, 36 Mo. App. 602; *Sun Ins. Co. v. Mattingly*, 77 Tex. 162, 13 S. W. Rep. 1016; *Phoenix Ins. Co. v. Bachelder*, 32 Nebr. 490, 49 N. W. Rep. 217; *Phoenix Ins. Co. v. Weeks*, 45 Kans. 751, 26 Pac. Rep. 410; *California Ins. Co. v. Grassy*, 15 Colo. 70, 24 Pac. Rep. 577; *Commercial Union Ins. Co. v. State*, 113 Ind. 331, 15 N. E. Rep. 518; *Farmers' Ins. Co. v. Moyer*, 97 Pa. St. 441; *Miller v. Alliance Ins. Co. (U. S. Cir.)*, 19 Blatchf. 308; *Batchelor v. People's Ins. Co.*, 40 Conn. 56; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. (Va.) 613; *Sheppard v.*

Peabody Ins. Co., 21 W. Va. 368; *Roe v. Dwelling-House Ins. Co.*, 149 Pa. St. 94; *Westchester Ins. Co. v. Coverdale*, 9 Kans. App. 651, 58 Pac. Rep. 1029; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207, 57 N. E. Rep. 991; *Merchants' Ins. Co. v. Nowlin*, Tex. Civ. App., 56 S. W. Rep. 198; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101.

RULE 58.

Nonwaiver Agreement.

While the insured and the insurance company or its adjuster may make a written agreement after a loss preventing a claim of waiver of proof of loss by a denial of liability,¹ an adjuster may, notwithstanding such a written agreement, waive proof of loss by an unequivocal denial of liability.²

1. *Insurance Co. of N. A. v. Caruthers*, Miss., 16 So. Rep. 911.

2. *Cooper v. Insurance Co. of Pa.*, 96 Wis. 362, 71 N. W. Rep. 606, 26 Ins. L. J. 985.

RULE 59.

Waiver and Estoppel — Essentials.

While there may be a waiver or estoppel after the expiration of the time limited in the policy for furnishing of the statement or proof of loss,¹ if not so furnished, the waiver should be founded on what is said or done during the prescribed time when the assured still had opportunity to comply with the condition;² if furnished after limited period, silence of the company does not operate as a waiver of the objection that it was not furnished in time;³ but entering into an appraisal does;⁴ and so acting or speaking thereon as if furnished in time, coupled with silence as to time, may be evidence of waiver;⁵ but if objection is made on that spe-

cific ground, delay in making it does not operate as a waiver.⁶

1. *Cohn v. Orient Ins. Co.*, 62 Mo. App. 271. See Rule 62 and cases thereunder.

2. *Cohn v. Orient Ins. Co.*, 62 Mo. App. 271; *Bolan v. Fire Assoc.*, 58 Mo. App. 225; *Dwelling-House Ins. Co. v. Jones*, 47 Ill. App. 261; *Beatty v. Lycoming Ins. Co.*, 66 Pa. St. 9; *Engebretson v. Hekla Ins. Co.*, 58 Wis. 301; *Brown v. London Assur. Co.*, 40 Hun, 101; *Exchange Bank v. Thuringia Ins. Co.*, Mo. App. , 83 S. W. Rep. 534.

3. *Cohn v. Orient Ins. Co.*, 62 Mo. App. 271; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Brink v. Hanover Ins. Co.*, 70 N. Y. 593; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Lycoming Ins. Co.*, 19 Hun, 238; *Perry v. Caledonian Ins. Co.*, App. Div. , 93 N. Y. Supp. 50. And see Rule 10.

4. *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844.

5. *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (U. S.) 527; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Brink v. Hanover Ins. Co.*, 80 N. Y. 108; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 8 Atl. Rep. 589; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

6. *Carey v. Allemannia Ins. Co.*, 171 Pa. St. 210, 33 Atl. Rep. 185.

As to proofs of loss and waiver under the Iowa statute, see *Warshawky v. Anchor Mutual Ins. Co.*, 98 Iowa, 221, 67 N. W. Rep. 237; *Dyer v. Des Moines Ins. Co.*, 103 Iowa, 524, 72 N. W. Rep. 68; *Pringle v. Des Moines Ins. Co.*, 107 Iowa, 742, 77 N. W. Rep. 521, 28 Ins. L. J. 138; *Parks v. Anchor Mutual Ins. Co.*, 106 Iowa, 402, 76 N. W. Rep. 743.

RULE 60.

Waiver Once Made Final.

Where once waived a subsequent filing or furnishing of proof of loss by the assured does not affect his right under such waiver.

Massell v. Protective Mutual Ins. Co., 19 R. I. 565, 35 Atl. Rep. 209; *Warshawky v. Anchor Mut. Ins. Co.*, 98 Iowa, 221, 67 N. W. Rep. 237. And see "Waiver."

RULE 61.

Effect of Statute Fixing Amount of Loss on Building.

Where the policy requires a statement or proof of loss for *other* purposes than merely to show the amount of loss, a State statute making a loss total on building does not operate to relieve the assured from furnishing proofs of loss.

McCollum v. Hartford Ins. Co., 67 Mo. App. 76.

RULE 62.

Waiver of Statement or Proofs of Loss.

There is no fixed or inflexible rule as to what shall or shall not be regarded in the law as a waiver, or as evidence of waiver of the statement or proof of loss, or of defects therein. The courts are inclined to take hold of slight circumstances bearing on the subject and to regard them as at least evidence of waiver requiring the question as one of fact to be submitted to a jury. Anything is sufficient which the proper officer or representative of the insurance company is willing to accept;¹ waiver may be inferred from a course of conduct or declaration leading assured to believe that performance is not required;² any declaration or conduct by adjuster or special agent inconsistent with an intention to demand strict compliance;³ an offer to pay a certain sum unless in terms made without prejudice, or a promise to pay, or to pay as appraised, may be evidence of waiver;⁴ and so where the company demands further specific proof, knowing that assured is unable to comply with it or comply in time,⁵ or demands something not required by the policy;⁶ or after time for service has expired, by any act recognizing liability;⁷

by sending blank proof on request and receiving after a limited time, or promising to send and failing to do so;⁸ a demand of further proof waives objection that proofs were not furnished in a certain time;⁹ and so by delaying objections until short time before expiration of limited period;¹⁰ writing assured that adjuster will be sent to settle loss, or when delay is otherwise induced, waives proof in limited time;¹¹ informing assured that proof is unnecessary is evidence of waiver;¹² proceeding under appraisal, and in connection therewith, inducing assured to delay the furnishing of proof, evidence of waiver of same in limited time;¹³ or as waiver of defects in those furnished.¹⁴

1. *Pringle v. Des Moines Ins. Co.*, 107 Iowa, 742, 77 N. W. Rep. 521, 28 Ins. L. J. 138; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. Rep. 1048; *Moyer v. Sun Ins. Office*, 176 Pa. St. 579, 35 Atl. Rep. 221; *Fritz v. Quaker City Ins. Co. (Pa.)*, 26 Atl. Rep. 14; *Green v. Des Moines Ins. Co.*, 84 Iowa, 135, 50 N. W. Rep. 558; *Phoenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. Rep. 67; *Wright v. Insurance Co.*, 12 Mont. 474, 31 Pac. Rep. 87; *Minneapolis F. & M. Ins. Co. v. Fultz*, Ark. , 80 S. W. Rep. 576; *Glaser v. Home Ins. Co.*, 93 N. Y. Supp. 524.

2. *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. Rep. 606; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Van Allen v. Farmers' Ins. Co.*, 10 Hun, 397, *affd.*, 72 N. Y. 604; *Porter v. German-American Ins. Co.*, 62 Mo. App. 520; *State Ins. Co. v. Todd*, 83 Pa. St. 272; *McPike v. Western Assur. Co.*, 61 Miss. 37; *Swain v. Agricultural Ins. Co.*, 37 Minn. 390, 34 N. W. Rep. 738; *Germania Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. Rep. 921; *American Central Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. Rep. 159; *Prussian Nat. Ins. Co. v. Petersen*, 30 Ind. App. 289, 64 N. E. Rep. 102; *Peninsular Land Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. Rep. 237; *Young v. Ohio Farmers' Ins. Co.*, 92 Mich. 68, 52 N. W. Rep. 454; *Carey v. Allemannia Ins. Co.*, 171 Pa. St. 204, 33 Atl. Rep. 385; *O'Brien v. Prescott Ins. Co.*, 57 Hun, 589, 11 N. Y. Supp. 125; *National Ins. Co. v. U. S.*

Building-Loan Assoc. (Ky.), 54 S. W. Rep. 714; Washburn-Halligan Coffee Co. v. Merchants' Ins. Co., 110 Iowa, 423, 81 N. W. Rep. 707; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. Rep. 409; Nicholas v. Iowa Merchants' Ins. Co., Iowa, , 101 N. W. Rep. 115.

3. Hartford Ins. Co. v. Keating, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; American Central Ins. Co. v. Hill, 60 Ill. App. 163; St. Paul F. & M. Ins. Co. v. Gotthelf, 35 Nebr. 351, 53 N. W. Rep. 137, 22 Ins. L. J. 34; Hanover Ins. Co. v. Gustin, 40 Nebr. 828, 59 N. W. Rep. 375, 23 Ins. L. J. 651; Hitchcock v. State Ins. Co., 10 S. D. 271, 72 N. W. Rep. 898; Dowling v. Merchants' Ins. Co., 168 Pa. St. 234, 31 Atl. Rep. 1087, 24 Ins. L. J. 795; Carey v. Allemannia Ins. Co., 171 Pa. St. 204, 33 Atl. Rep. 185, 25 Ins. L. J. 137; Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. Rep. 256; Heusinkveld v. St. Paul F. & M. Ins. Co., 106 Iowa, 229, 76 N. W. Rep. 696; Edgerley v. Farmers' Ins. Co., 48 Iowa, 644; Home Ins. Co. v. Bethel, 142 Ill. 537, 32 N. E. Rep. 510, 22 Ins. L. J. 104; Mitchell v. Orient Ins. Co., 40 Ill. App. 111; Cushing v. Williamsburg City Ins. Co., 4 Wash. 538, 30 Pac. Rep. 736, 21 Ins. L. J. 934; Wicking v. Citizens' Ins. Co., 118 Mich. 640, 77 N. W. Rep. 275; Margeson v. Commercial Union Assur. Co., 31 Ont. 337; Harrison v. German-American Ins. Co., 67 Fed. Rep. 577; Helvetia Swiss Ins. Co. v. Allis Co., 11 Colo. App. 264, 53 Pac. Rep. 242; Indiana Ins. Co. v. Pringle, 21 Ind. App. 559, 52 N. E. Rep. 821; Indiana Ins. Co. v. Capehart, 108 Ind. 270; Landrum v. American Central Ins. Co., 68 Mo. App. 339; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401; German Ins. Co. v. Norris, 11 Tex. Civ. App. 250, 32 S. W. Rep. 727.

4. Hartford Ins. Co. v. Keating, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; Pentz v. Pennsylvania Ins. Co., 92 Md. 444, 48 Atl. Rep. 139; Dee & Sons Co. v. Key City Ins. Co., 104 Iowa, 167, 73 N. W. Rep. 594; McClelland v. Greenwich Ins. Co., 107 La. 124, 31 So. Rep. 691; McCoubray v. St. Paul F. & M. Ins. Co., 50 App. Div. 416, 64 N. Y. Supp. 112, affd. without opinion, 169 N. Y. 590; Manchester Ins. Co. v. Feibelman, 118 Ala. 308, 23 So. Rep. 759, 27 Ins. L. J. 855; Phoenix Ins. Co. v. Gibbons (Ky.), 64 S. W. Rep. 909; Murphy v. North British & M. Ins. Co., 70 Mo. App. 78; Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. Rep. 793; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93; Smith v. Home Ins. Co., 47 Hun. 30; Townsend v. Merchants' Ins. Co., 4 J. & S. 172, affd. without opinion, 56 N. Y. 655; Snowden v. Kittanning Ins. Co., 122 Pa. St. 502, 16 Atl. Rep. 22; Exchange Bank v. Thuringia Ins. Co., Mo. App. , 83 S. W. Rep. 534; Glazer v. Home Ins. Co., Misc. , 90 N. Y. Supp. 426.

5. *Phoenix Ins. Co. v. Center*, 10 Tex. Civ. App. 535; *Hicks v. Empire Ins. Co.*, 6 Mo. App. 254.

6. *McManus v. Western Assur. Co.*, 22 Misc. 269, 48 N. Y. Supp. 820; *Waggonick v. Westchester Ins. Co.*, 34 Ill. App. 629; *Phoenix Ins. Co. v. Center*, 10 Tex. Civ. App. 535, 31 S. W. Rep. 446.

7. *Fink v. Lancashire Ins. Co.*, 66 Mo. App. 513; *Thierolf v. Universal Ins. Co.*, 110 Pa. St. 37, 20 Atl. Rep. 412; *Storm v. Phoenix Ins. Co.*, 61 Hun, 618, 15 N. Y. Supp. 281; *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799.

8. *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. Rep. 383, 25 Ins. L. J. 610; *Davidson v. Guardian Assur. Co.*, 176 Pa. St. 525, 35 Atl. Rep. 220; *Craighton v. Agricultural Ins. Co.*, 39 Hun, 319.

9. *Merchants' Ins. Co. v. Gibbs*, 56 N. J. L. 679, 29 Atl. Rep. 485, 23 Ins. L. J. 791; *German Ins. Co. v. Grunert*, 112 Ill. 74.

10. *McCarrel v. Phoenix Ins. Co.*, 64 Minn. 193, 66 N. W. Rep. 367.

11. *Powers v. New England Ins. Co.*, 68 Vt. 390, 35 Atl. Rep. 331; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. Rep. 668; *Craighton v. Agricultural Ins. Co.*, 39 Hun, 321; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Smith v. Home Ins. Co.*, 47 Hun, 30; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704; *Dobson v. Hartford Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456.

12. *Smaldone v. Insurance Co. of N. A.*, 15 App. Div. 232, 44 N. Y. Supp. 201; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 29 N. E. Rep. 844; *Ruthven v. American Ins. Co.*, 102 Iowa, 550, 71 N. W. Rep. 574, 27 Ins. L. J. 593; *Mix v. Royal Ins. Co.*, 169 Pa. St. 639, 32 Atl. Rep. 460.

13. *Sharpe v. Milwaukee Mechanics' Ins. Co.*, 8 App. Div. 354, 40 N. Y. Supp. 817, *affd.* on opinion below, 158 N. Y. 696; *Rademacher v. Greenwich Ins. Co.*, 75 Hun, 83, 27 N. Y. Supp. 155; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Murphy v. North British & M. Ins. Co.*, 70 Mo. App. 78; *Perry v. Greenwich Ins. Co.*, N. C., 49 S. E. Rep. 889.

14. *Jacobs v. St. Paul Ins. Co.*, 86 Iowa, 145, 53 N. W. Rep. 101; *Connecticut Ins. Co. v. Hamilton*, 59 Fed. Rep. 258, 16 U. S. App. 366, 8 C. C. A. 114.

And as to waiver in appraisal, see "Appraisal." And see Rule 48.

RULE 63.

Limitations as to Waiver of Statement or Proofs of Loss.

An independent investigation by the company on its own account before receiving proof of loss is no

dence of waiver;¹ what an adjuster says and does *after* the expiration of the limited time for furnishing of proofs does not always operate as evidence of waiver of objection that they were not furnished in time;² a statement in acknowledging notice of loss, that it "will receive prompt attention," does not waive proof within prescribed time;³ nor does a similar statement in a letter, in reply to an inquiry about the loss, to effect that matter is in hands of a certain person who will give prompt attention as soon as possible, waive defects in those furnished;⁴ when assured is notified so that he has ample time to supply or remove defects, there is more hesitation about inferring a waiver or estoppel on acts of adjuster; a waiver may be construed as conditional;⁵ there is no waiver in negotiations for settlement and in offer, when at same time assured is informed that proofs are required;⁶ if adjuster is sent only to ascertain extent of loss and does so, reducing same to writing, that does not of itself necessarily waive other matters required by the policy;⁷ mere *silence* does not waive objection that proof was not furnished in time;⁸ negotiation for settlement and an offer to pay may operate as a waiver as to time, but not of the proofs, when offer is withdrawn or rejected;⁹ examination, investigation, and negotiation do not themselves constitute a waiver of proofs,¹⁰ but may create a question of fact.¹¹

1. *People's Bank v. Aetna Ins. Co.*, 74 Fed. Rep. 507, 20 C. C. A. 630, 42 U. S. App. 81; *Cedar Rapids Ins. Co. v. Shimp*, 16 Bradw. (Ill.) 248; *Bornazewski v. Middlesex Assur. Co.*, Mass., 72 N. E. Rep. 250.

2. *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543.

3. *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. Rep. 952, 23 Ins. L. J. 453. And see *Birmingham v. Farmers'*

Ins. Co., 67 Barb. 595; German Ins. Co. v. Davis, 40 Nebr. 700, 59 N. W. Rep. 698.

4. German Ins. Co. v. Davis, 40 Nebr. 700, 59 N. W. Rep. 698, 23 Ins. L. J. 768.

5. Allen v. Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. Rep. 15.

6. Flanagan v. Phoenix Ins. Co., 42 W. Va. 426, 26 S. E. Rep. 513. And see Allen v. Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. Rep. 15; Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. Rep. 630.

7. Dwelling-House Ins. Co. v. Dowdall, 159 Ill. 179, 42 N. E. Rep. 606, 25 Ins. L. J. 267.

8. Carey v. Allemannia Ins. Co., 171 Pa. St. 204, 33 Atl. Rep. 185, 25 Ins. L. J. 137; Kirkman v. Farmers' Ins. Co., 90 Iowa, 457, 57 N. W. Rep. 952, 23 Ins. L. J. 453; Central City Ins. Co. v. Oates, 86 Ala. 558, 6 So. Rep. 83; Stevens v. Phoenix Ins. Co., 32 N. B. 394; Parker v. Farmers' Ins. Co., Mass., 74 N. E. Rep. 286.

9. Warner v. Insurance Co. of N. A., 1 Walker (Pa.), 315. And see Leigh v. Springfield Ins. Co., 37 Mo. App. 542; Knudson v. Hekla Ins. Co., 75 Wis. 198, 43 N. W. Rep. 954.

10. Home Ins. Co. v. Sorsby, 60 Miss. 302.

11. New Orleans Ins. Assoc. v. Matthews, 65 Miss. 301, 4 So. Rep. 62.

TITLE II.

Plans and Specifications.

- RULE 1. Duty to furnish plans and specifications as imposed by contract.
2. Plans and specifications independently procured.
 3. Effect of appraisal and award.
 4. Objections must be promptly made.
 5. Demand for plans and specifications not necessarily waiver of other defenses.
 6. Effect of statute fixing amount of loss.

RULE 1.

Duty to Furnish Plans and Specifications as Imposed by Contract.

If required by the insurance company it is the duty of the insured to furnish verified plans and specifica-

tions of any building, fixtures, or machinery destroyed or damaged.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Plans and Specifications Independently Procured.

If the insurance company, independently of the assured, procures plans and specifications of building destroyed and thereafter proposes settlement on such basis, it operates as a waiver of the condition requiring same to be furnished by the assured.

Ligon v. Equitable Ins. Co., 87 Tenn. 341, 10 S. W. Rep. 768.

RULE 3.

Effect of Appraisal and Award.

Where company has stated its intention not to rebuild, and entered into an appraisal and the award

* See note "Duty to Save and Preserve Property," Rule 1, page 2.

fixes the amount of the loss, it is too late to demand plans and specifications.

Lancashire Ins. Co. v. Barnard, 111 Fed. Rep. 702, 49 C. C. A. 559.

RULE 4.

Objections Must be Promptly Made.

Objections, if any, to plans and specifications furnished must be promptly made; otherwise, if not made, or delay in making, becomes evidence of waiver.

Breckenridge v. American Central Ins. Co., 87 Mo. 62.

RULE 5.

Demand for Plans and Specifications not Necessarily Waiver of Other Defenses.

A demand for plans and specifications, even although involving expense to the insured, does not operate as a waiver of other defenses, where the assured is not misled to his prejudice.

Boyd v. Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. Rep. 470. *Contra*, *Webster v. Phoenix Ins. Co.*, 36 Wis. 67. And see "Waiver."

RULE 6.

Effect of Statute Fixing Amount of Loss.

Where a statute makes the amount written in the policy the measure of damage in event of a total destruction or loss, plans and specifications cannot be required by the insurance company.

Western Assur. Co. v. Brown (Tex.), 33 S. W. Rep. 994; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 62 N. E. Rep. 338, 56 L. R. A. 159. And see *Murphy v. New York Bowery Ins. Co.*, 62 Mo. App. 495.

TITLE III.**Certificate of Magistrate or Notary.**

- RULE 1.** Duty of insured to furnish certificate of magistrate or notary public as imposed by contract.
2. Condition legally operative and binding upon the insured.
 3. Requirement when made must be express and specific.
 4. Certificate need not be in precise language of condition — Substantial compliance.
 5. Certificate no part of the statement or proof of loss — Delay in furnishing certificate.
 6. Construction of living nearest the place of fire — What is required on part of company when it objects that notary is not the nearest.
 7. When nearest magistrate or notary declines to act.
 8. Effect of location of office and knowledge of insured.
 9. Distance of few feet or yards not regarded as material.
 10. Effect of insurance company employing nearest notary and magistrate.
 11. When notary disqualified — Waiver.
 12. Disqualification of notary or magistrate.
 13. Duty of company to point out defects in certificate — Waiver.
 14. Waiver of certificate.
 15. Insured not bound by amount in certificate.

RULE 1.**Duty of Insured to Furnish Certificate of Magistrate or Notary Public as Imposed by Contract.**

If required by the insurance company, it is the duty of the insured to furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly

sustained loss to the amount that such magistrate or notary public shall certify.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	New Jersey,
Connecticut,	North Carolina,
Louisiana,	North Dakota,
Michigan,	*Pennsylvania,
Missouri,	Rhode Island.

In Wisconsin the standard form provides as above except the clause "residing in the county where the insured property is located" is substituted for the clause "living nearest the place of fire."

The standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain provision as to a certificate.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Condition Legally Operative and Binding upon the Insured.

When the certificate is required the condition becomes legally operative and binding upon the insured, unless waived by the insurance company.

Sullivan v. Germania Ins. Co., 89 Mo. App. 106; Hubbard v. North British & M. Ins. Co., 57 Mo. App. 1; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; Kelly v. Sun Fire Office, 141 Pa. St. 10; McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. Rep. 475; Johnson v. Phoenix Ins. Co., 112 Mass. 49; Lane v. St. Paul Ins. Co., 50 Minn. 227, 52 N. W. Rep. 649; Home Ins. Co. v. Duke, 43 Ind. 418; Leadbetter v. Aetna Ins.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

Co., 13 Me. 265; Noonan v. Hartford Ins. Co., 21 Mo. 81; Gilligan v. Commercial Ins. Co., 20 Hun, 93, *affd.* without opinion, 87 N. Y. 626; Gottlieb v. Dutchess County Ins. Co., 89 Hun, 36; Daniels v. Equitable Ins. Co., 50 Conn. 551; Brown v. Hartford Ins. Co., 52 Hun, 260, 265, *affd.*, 132 N. Y. 539, no opinion; Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Edgerley v. Farmers' Ins. Co., 48 Iowa, 644; Roumage v. Mechanics' Ins. Co., 13 N. J. L. 110.

Exception.—In Kentucky *it seems* that the condition is not enforceable as a condition precedent. German-American Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. Rep. 267. The certificate was furnished as matter of fact. See 100 Ky. 33. And the case is not exactly convincing as authority in view of the weight of decisions elsewhere. Doubt is also expressed as to validity of the condition as precedent to right to sue in Home Ins. Co. v. Hamman, 44 Nebr. 567, 62 N. W. Rep. 883, 24 Ins. L. J. 493.

RULE 3.

Requirement, When Made, Must be Express and Specific.

Insured is under no duty to furnish certificate unless expressly or specifically required to do so; a general notice or demand of strict compliance with the conditions of the policy is not a sufficient requirement;¹ and so an objection to a statement or proof of loss furnished that it does not contain such a certificate, or if it does, merely that it is defective, does not amount to such a requirement as to make the condition operative;² but when certificate is furnished in first instance voluntarily as part of the statement or proof of loss, and such certificate is objected to, such objection may be made so as to amount to a requirement.³

1. Moyer v. Sun Ins. Co., 176 Pa. St. 579, 35 Atl. Rep. 221; *Ætna Ins. Co. v. Shacklett*, Tex. Civ. App., 57 S. W. Rep. 583; *McManus v. Western Assur. Co.*, 43 App. Div. 550, *affd.* without opinion, 167 N. Y. 602.

2. *Swearinger v. Pacific Ins. Co.*, 66 Mo. App. 90; *Burnett v. American Central Ins. Co.*, 68 Mo. App. 343. And see *Sullivan v. Germania Ins. Co.*, 89 Mo. App. 106; *McNally v. Phoenix*

Ins. Co., 137 N. Y. 389, 33 N. E. Rep. 475; *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578.

3. *Ætna Ins. Co. v. People's Bank*, 62 Fed. Rep. 222, 10 C. C. A. 342, 23 Ins. L. J. 307; *Williams v. Queen Ins. Co.*, 39 Fed. Rep. 167.

RULE 4.

Certificate Need not be in Precise Language of Condition — Substantial Compliance.

While the certificate need not be in the precise or exact language of the condition it should contain the same substantially and mean the same thing.

Ætna Ins. Co. v. Tyler, 16 Wend. 385; *Germania Ins. Co. v. Curran*, 8 Kans. 9.

RULE 5.

Certificate no Part of the Statement or Proof of Loss — Delay in Furnishing Certificate.

The certificate is no part of the statement or proof of loss, which cannot be returned with the objection that such certificate is not attached. Insured is bound to furnish the certificate if required or use due diligence to procure it; but if effort is made and delay is caused by refusal of several magistrates to whom application is made, and there are during this time negotiations for a settlement, delay in furnishing the certificate, which is finally obtained, does not as matter of law defeat the insurance. Whether insured's conduct in respect to the certificate is diligent or unreasonable is a question for a jury;¹ the limitation in time for furnishing the statement has no application to the certificate.²

1. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. Rep. 475. And see *Merchants' Ins. Co. v. Gibbs*, 56 N. J. L. 679, 29 Atl. Rep. 485.

2. *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. Rep. 845.

RULE 6.

Construction of Living Nearest the Place of Fire — What is Required on Part of Company When it Objects that Notary is not the Nearest.

The phrase "living nearest the place of fire," is not confined entirely to the food and sleep of the notary and takes account of the place where he lives officially and to which by some public sign he invites those who do business with him; in any event good faith on part of the insurance company requires that when they reject one certificate on the ground that there is a nearer notary they should give the name and address of such nearer notary, to enable the insured to comply with their demand; if they do not do so, it may be, in connection with delay in objecting to the certificate, evidence of waiver.

Paltrovitch v. Phoenix Ins. Co., 143 N. Y. 73, 37 N. E. Rep. 639, affg. 68 Hun, 304, 23 N. Y. Supp. 38; *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400, 17 Atl. Rep. 380; *Turley v. North American Ins. Co.*, 25 Wend. 374.

RULE 7.

When Nearest Magistrate or Notary Declines to Act.

Where the magistrate or notary living nearest the place of fire declines to act it is sufficient if the assured procures the certificate of the nearest who is willing to act; there being no objection to him or to the certificate itself;¹ so where there is no specific objection the certificate may be signed by the nearest notary or by the nearest magistrate,² and by any magistrate or notary where there is a statute so prescribing.³

1. *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209.

2. *Craighton v. Agricultural Ins. Co.*, 39 Hun, 319. *Contra*, *Williams v. Queen Ins. Co.*, 39 Fed. Rep. 167.

3. *Bailey v. Hope Ins. Co.*, 56 Me. 474. And see *Vorous v. Phoenix Ins. Co.*, 102 Wis. 76, 78 N. W. Rep. 162. See also Rule 1.

RULE 2.

Effect of Location of Office and Knowledge of Insured.

A certificate of the nearest magistrate or justice of the peace is a sufficient compliance with the terms of the policy, notwithstanding the fact that a notary resides nearer to the place of fire than the justice, but has his office in a distant town, and the insured does not know that he is a notary.

Oswalt v. Hartford Ins. Co., 175 Pa. St. 427, 34 Atl. Rep. 735.

RULE 9.

Distance of Few Feet or Yards not Regarded as Material.

Where the assured has made honest efforts to comply with the condition, nice and mathematical calculation of distances will not be gone into to ascertain who is the nearest notary or magistrate; a distance of a few feet or yards, more or less, from place of fire will not be regarded as material;¹ but a distance in rods may become material where there are several nearer notaries and magistrates, and the assured having been advised by proper objections to certificate furnished willfully ignores same.²

1. *American Central Ins. Co. v. Rothschild*, 82 Ill. 156; *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400, 17 Atl. Rep. 380; *German-American Ins. Co. v. Etherton*, 25 Nebr. 505, 41 N. W. Rep. 406; *Smith v. Home Ins. Co.*, 47 Hun, 30; *Turley v. North American Ins. Co.*, 25 Wend. 374; *Williams v. Niagara Ins. Co.*, 50 Iowa, 561; *Dolliver v. St.*

Joseph Ins. Co., 128 Mass. 315; *Daniels v. Equitable Ins. Co.*, 50 Conn. 551; *Paltrovitch v. Phoenix Ins. Co.*, 68 Hun, 304, 23 N. Y. Supp. 38.

2. *Gilligan v. Commercial Ins. Co.*, 20 Hun, 93, *affd.* without opinion, 87 N. Y. 626. And see *Protection Ins. Co. v. Pher-son*, 5 Ind. 417.

RULE 10.

Effect of Insurance Company Employing Nearest Notary and Magistrate.

The insured is relieved from furnishing the certificate where the insurance company employs the nearest notary and magistrate, thus preventing the assured from obtaining such certificate.

Deland v. Ætna Ins. Co., 68 Mo. App. 277. And see *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152, 26 Pac. Rep. 103.

RULE 11.

When Notary Disqualified — Waiver.

A notary who is husband of a first cousin of the assured is so "related" as to be disqualified;¹ and so where the notary or magistrate is responsible for assured's paper;² nor can the assured qualify himself to give such a certificate for benefit of an assignee, by having divested himself of all interest;³ but if certificate is made by other than a notary or magistrate, if no objection is made on that specific ground, it operates as a waiver.⁴

1. *People's Bank v. Ætna Ins. Co.*, 74 Fed. Rep. 507, 20 C. C. A. 630, 42 U. S. App. 81.

2. *Margeson v. Commercial Union Assur. Co.*, 31 N. S. 337.

3. *Stevens v. Phoenix Ins. Co.*, 32 N. B. 394.

4. *Hilton v. Phoenix Ins. Co.*, 92 Me. 272, 42 Atl. Rep. 412; *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50.

RULE 12.

Disqualification of Notary or Magistrate.

Where the language is "not concerned in the loss as creditor or otherwise" it does not disqualify every notary or magistrate who by chance happens to be creditor to a small amount of the assured. The clause should be construed as requiring certificate from one who is not concerned in the loss by reason of having an interest in the property or in the policy or insurance as security;¹ but a notary or magistrate is disqualified where his property was destroyed by the same fire, and he has charged assured with willfully causing it; under such circumstances the next nearest would be proper party to give the certificate.²

1. *Dolliver v. St. Joseph Ins. Co.*, 131 Mass. 39.

2. *Wright v. Hartford Ins. Co.*, 36 Wis. 522. And see *Smith v. Home Ins. Co.*, 47 Hun, 30; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

It should be noted that the language in the standard forms is changed to "not *interested* in the *claim* as creditor or otherwise," etc. See Rule 1. The specific words "interested" and "claim" would seem to require a more limited construction than the words "concerned" and "loss." A party may be concerned in a loss and yet not be interested in the claim.

RULE 13.

Duty of Company to Point Out Defects in Certificate—Waiver.

It is the duty of the insurance company to point out the defects in the certificate furnished and give every facility for their correction;¹ those not pointed out are waived;² while the objections should be promptly and seasonably made,³ retention for sixteen⁴ days or delay of even thirty-seven⁵ days in demanding the certificate

which does not injure the insured, he having reasonable opportunity to correct, supply, or amend, will not of itself operate as a waiver.

1. *Turley v. North American Ins. Co.*, 25 Wend. 374; *Travis v. Continental Ins. Co.*, 32 Mo. App. 198; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103.

2. *Bailey v. Hope Ins. Co.*, 56 Me. 474; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466.

3. *Travis v. Continental Ins. Co.*, 32 Mo. App. 198; *Nease v. Ætna Ins. Co.*, 32 W. Va. 283, 9 S. E. Rep. 233; *Purves v. Germania Ins. Co.*, 44 La. Ann. 123, 10 So. Rep. 495.

4. *Gilligan v. Commercial Ins. Co.*, 20 Hun, 93, *affd.* without opinion, 87 N. Y. 626.

5. *Williams v. Queen Ins. Co.*, 39 Fed. Rep. 167.

RULE 14.

Waiver of Certificate.

Objections to a certificate furnished are waived unless promptly and specifically made upon its receipt;¹ retention without objection for twenty-three days is evidence of waiver;² denial of liability waives certificate.³

1. *Schmurr v. State Ins. Co.*, 30 Oreg. 29, 46 Pac. Rep. 363, 26 Ins. L. J. 373; *Bailey v. Hope Ins. Co.*, 56 Me. 474.

2. *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 37 N. E. Rep. 639, *affg.* 68 Hun, 304, 23 N. Y. Supp. 38.

3. *American Central Ins. Co. v. Henninger*, 87 Ill. App. 440; *Home Ins. Co. v. Hamman*, 44 Nebr. 567, 62 N. W. Rep. 883, 24 Ins. L. J. 493.

Failure to require the certificate of course operates as a waiver of the condition; delay in making the requirement may become evidence of waiver, where the insured is not given a reasonable opportunity to comply with it, and is injured or misled or prejudiced in any way. Just when or at what point or under what circumstances the delay in making the requirement becomes evidence of waiver cannot be formulated into rule. As soon as it does become evidence of waiver the question is one of fact. See "Statement or Proofs of Loss and Waiver."

RULE 15.

Insured not Bound by Amount in Certificate.

The insured is not bound by the amount of loss stated in the certificate.

Birmingham Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. Rep. 804.

TITLE IV.

Examination of Insured Under Oath.

- RULE**
1. Duty of insured to submit to examination as imposed by contract.
 2. Examination no part of statement or proof of loss.
 3. Examination does not itself waive statement of loss.
 4. Condition precedent — Effect of insured absenting himself so cannot be served with demand.
 5. Examination must be required — Essentials of demand.
 6. What is not requirement.
 7. Insured cannot be required to bring books to office of company.
 8. Insured may have his attorney present.
 9. Insured must answer material or relevant questions.
 10. What is material.
 11. Must be specific demand for signing — Insured must be permitted to sign.
 12. Effect of misstatements in examination.
 13. Examination not satisfactory no ground of objection.
 14. Waiver by renewal of negotiation.
 15. Waiver by examination of a third party.
 16. Insured not estopped by his statements — Evidence.
 17. Rule as to waiver imposed by contract.

RULE I.

Duty of Insured to Submit to Examination as Imposed by Contract.

It is the duty of insured as often as required to submit to examinations under oath by any person named

by the insurance company, and to subscribe the same.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain provision for examination.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Examination no Part of Statement or Proof of Loss.

The examination is no part of the statement or proof of loss;¹ but an examination may, however, be required and accepted by the insurance company as sufficient statement or proofs of loss, and may have that effect unless specifically demanded where the examination is had before formal proofs of loss are made.²

1. *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465.

2. *Badger v. Phoenix Ins. Co.*, 49 Wis. 396. And see *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

RULE 3.

Examination Does not Itself Waive Statement of Loss.

An examination does not of itself waive statement or proofs of loss.

Home Ins. Co. v. Sorsby, 60 Miss. 302. And see *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347. See also "Waiver."

RULE 4.

Condition Precedent — Effect of Insured Absenting Himself so He Cannot be Served with Demand — No Substitute for Insured.

The clause requiring an examination is binding as a condition precedent to the loss becoming due and payable; the assured cannot escape the consequences by voluntarily absenting himself so he cannot be served with demand, the insurance company using due diligence. Such absence may be the equivalent of refusal.¹ A receiver in bankruptcy cannot be regarded as the insured for purpose of examination as a legal representative.² An agent cannot be substituted for the insured.³

1. *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, 42 S. E. Rep. 269; *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804; *Pearlstine v. Westchester Ins. Co.*, S. C. , 49 S. E. Rep. 4.

2. *Sims v. Union Assur. Soc.*, *supra*.

3. *Pearlstine v. Westchester Ins. Co.*, S. C. , 49 S. E. Rep. 4.

It is held in Kentucky that it is not a condition precedent to right of action. *Scottish Union & Nat. Ins. Co. v. Strain*, 70 S. W. Rep. 274, 24 Ky. L. Rep. 992.

Whether the policy contained the usual clause that loss should not be payable "until after full compliance," etc., does not appear in the report. See "Payment of the Loss," Rule 1, page 348.

RULE 5.

Examination Must be Required — Essentials of Demand.

To make the clause operative as to examination of the insured it must not only be required,¹ but the company must also fix a time and place and the person to

take it; the time fixed must be within a reasonable time, and the place should be reasonably convenient to where the assured is or resides;² a place out of the county where assured resides may not be reasonable,³ but the place where property was destroyed is a reasonable place when the insured resides at a distant place in another State.⁴

1. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. Rep. 104; *Wells Whip Co. v. Tanners' Ins. Co.*, Pa. St. , 58 Atl. Rep. 894.

2. *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125. And see *Aurora Ins. Co. v. Johnson*, 46 Ind. 315; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *American Central Ins. Co. v. Simpson*, 43 Ill. App. 98.

3. *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125.

4. *Fleisch v. Insurance Co. of N. A.*, 58 Mo. App. 596.

RULE 6.

What Is not Requirement.

A letter requesting the assured to swear to a certain statement to be made out by his attorney is not a requirement for an examination under the clause in the policy.

Dougherty v. German-American Ins. Co., 67 Mo. App. 526.

RULE 7.

Insured Cannot be Required to Bring Books to Office of Company.

The insurance company cannot require the insured to bring his books and go to office of the company and there be subjected to an examination under oath.

American Central Ins. Co. v. Simpson, 43 Ill. App. 98.

RULE 8.

Insured May Have His Attorney Present.

The insured may insist upon the presence of his attorney before submitting to an examination, and if that privilege be denied to him, he is justified in declining to submit to the examination.

American Central Ins. Co. v. Simpson, 43 Ill. App. 98; *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 169.

This rule does not mean that the attorney is entitled as such to take part in the examination. It is the company's examination. While the insured should always be permitted to explain his answers to the questions put by the representative of the company, whenever he desires to do so, such explanation should be reserved until the close of the examination, to which it should be *added*, not *inserted throughout* the examination. It may be doubted whether strictly the powers of the insured's attorney extends beyond acting as such in an advisory capacity to the insured; as for instance, he may advise the insured not to answer certain questions. If he is permitted to question or examine the insured it should be only at close of examination by the company's representative, and it should be limited to explaining what the insured has stated.

RULE 9.

Insured Must Answer Material or Relevant Questions.

Assured must answer all questions having a relevant and material bearing on the insurance and the loss;¹ and such bearing should be made to reasonably appear;² the assured cannot be required to state on what terms he had settled with other companies.³

1. *Enos v. St. Paul Ins. Co.*, 4 S. D. 639, 57 N. W. Rep. 919, 23 Ins. L. J. 258; *Clafin v. Insurance Co.*, 110 U. S. 81; *Gross v. St. Paul F. & M. Ins. Co.*, 22 Fed. Rep. 74; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

2. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Porter v. Traders' Ins. Co.*, 164 N. Y. 504, 58 N. E. Rep. 641.

3. *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375.

RULE 10.**What is Material.**

Party from whom goods purchased, the price paid, and the time and mode of payment are material in examination;¹ but such materiality will not be assumed on appeal. It is a question of fact.²

1. *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81.

2. *Porter v. Traders' Ins. Co.*, 164 N. Y. 504, 58 N. E. Rep. 641. And see Rule 9.

RULE 11.**Must be Specific Demand for Signing — Insured Must be Permitted to Sign.**

Where the assured has submitted to the examination required, but has not signed the same, there must be a specific demand for such signing before the failure to subscribe can be urged as an objection to a recovery on the policy,¹ and even after he has refused to sign he must be permitted to do so if he wants to.²

1. *Scottish Union & Nat. Ins. Co. v. Keene*, 85 Md. 263, 37 Atl. Rep. 33, 26 Ins. L. J. 963. And see *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Grigsby v. German Ins. Co.*, 40 Mo. App. 276.

2. *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131.

RULE 12.**Effect of Misstatements in Examination.**

Misstatements of fact made by insured on his examination do not avoid the policy unless made with fraudulent intent, knowing them to be false;¹ but where so made as to a material matter it forfeits the whole insurance and not merely the amount due on the particular item of loss or damage to which the false statement related.²

1. *Huston v. State Ins. Co.*, 100 Iowa, 402, 69 N. W. Rep. 674; *Knop v. National Ins. Co.*, 107 Mich. 323, 65 N. W. Rep. 228, 25 Ins. L. J. 181.

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2. Hamberg v. St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. Rep. 388, 26 Ins. L. J. 782.

See also "Fraud or False Swearing," and "Construction."

RULE 13.

Examination not Satisfactory no Ground of Objection.

The insurance company cannot make any available objection to the examination upon the ground that it is not satisfactory.

Myers v. Council Bluffs Ins. Co., 72 Iowa, 176.

RULE 14.

Waiver by Renewal of Negotiation.

Forfeiture on account of a refusal to submit to an examination is waived by renewal of negotiations for a settlement, making and keeping of an appointment at expense of time and money by assured, making of a statement and offer to be questioned under oath.

Wicking v. Citizens' Mutual Ins. Co., 118 Mich. 640, 77 N. W. Rep. 275, 28 Ins. L. J. 220.

RULE 15.

Waiver by Examination of a Third Party.

The examination of a third party or an agent of the assured operates as a waiver of the personal examination of the assured.

Western Assur. Co. v. McGlathery, 115 Ala. 213, 22 So. Rep. 104.

RULE 16.

Insured not Estopped by His Statements — Evidence.

The assured is not estopped by his statements on examination from establishing the truth to the con-

trary afterward;¹ the statements in the examination are admissible as evidence against him,² but should be specifically pointed out on a trial.³

1. *Germania Ins. Co. v. Curran*, 8 Kans. 9.

2. *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464.

3. *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. Rep. 388, 26 Ins. L. J. 782. And see "Statement or Proof of Loss."

RULE 17.

Rule as to Waiver Imposed by Contract.

The insurance company does not waive any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the examination.

This rule is imposed by above terms in the standard form of policy prescribed in New York and other States, with the exceptions, as stated under Rule 1.

It was doubtless inserted in the standard forms in view of the decision of the New York Court of Appeals, in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. The clause or condition of the standard forms referred to in the above rule is recognized and enforced by the courts. *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510, 66 N. W. Rep. 525. And see also *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464, 27 Ins. L. J. 584; *American Central Ins. Co. v. Nunn*, Tex. , 82 S. W. Rep. 497, revg. 79 S. W. Rep. 88.

The decisions in *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. Rep. 1015, 22 Ins. L. J. 57, and *Enos v. St. Paul Ins. Co.*, 4 S. D. 639, 57 N. W. Rep. 919, 23 Ins. L. J. 258, involved the construction of policies under old forms. In the *Carpenter* case fire occurred Oct. 10, 1883. In the *Enos* case fire occurred in 1888, but policy did not appear to contain above provision. And see "Waiver."

TITLE V.

Production of Books of Account, Bills, and Invoices.

- RULE 1.** Duty of insured to produce books and vouchers as imposed by contract.
2. Demand for production in reasonable time.
 3. Demand when coupled with demand for proofs.
 4. Demand for certified copies — When insured excused.
 5. Duplicate not certified copy — Demand.
 6. Objection must be specific.
 7. Place of examination of books.
 8. When policy contains iron safe clause.
 9. Waiver of forfeiture.
 10. Waiver of limitation clause.
 11. Effect of failure to produce books and vouchers.

RULE 1.

Duty of Insured to Produce Books and Vouchers as Imposed by Contract.

It is the duty of insured as often as required to produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by the insurance company or its representative, and shall permit extracts and copies thereof to be made.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

provides that "the company may also examine the books of account and vouchers of the insured, and make extracts from the same."

In South Dakota the provision is the same except that it reads "books and accounts."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Demand for Production in Reasonable Time.

A demand for production of books and vouchers and examination should be within reasonable time and fix a reasonable time to be operative;¹ and place.² In locality where fire occurs.³

1. *Jones v. Howard Ins. Co.*, 117 N. Y. 103.

2. *Seibel v. Firemens' Ins. Co.*, 24 Pa. Super. 154.

3. *Tucker v. Colonial Ins. Co.*, W. Va., 51 S. E. Rep. 86.

RULE 3.

Demand When Coupled With Demand for Proofs.

When the demand for the production of books is coupled with and made dependent upon a demand for proofs, if there is no obligation to furnish the proofs as demanded, the nonproduction of the books cannot be construed as a refusal to produce them.

Keeney v. Home Ins. Co., 71 N. Y. 396.

RULE 4.

Demand for Certified Copies — When Insured Excused.

The insured is bound to comply with Rule 1, and if certified copies are demanded the burden rests upon him to show that he made a reasonable effort to procure them and was unable to do so. Where he makes no effort he cannot recover;¹ the fact that it is not in his power to procure all does not excuse his failure to

procure such as may be obtainable,² but he is excused so far as not in his power to procure them.³

1. *Langan v. Royal Ins. Co.*, 162 Pa. St. 357, 29 Atl. Rep. 710, 23 Ins. L. J. 878; *Seibel v. Lebanon Ins. Co.*, 197 Pa. St. 106, 46 Atl. Rep. 851; *Fleisch v. Insurance Co. of N. A.*, 58 Mo. App. 596, 23 Ins. L. J. 634; *American Central Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. Rep. 129, 27 Ins. L. J. 785; *O'Brien v. Commercial Ins. Co.*, 63 N. Y. 108; *Farmers' Ins. Co. v. Mispelhorn*, 50 Md. 180; s. c., 53 Md. 473; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Rosenthal Clothing Co. v. Scottish Union & Nat. Ins. Co.*, W. Va., 46 S. E. Rep. 1021.

2. *Ward v. National Ins. Co.*, 10 Wash. 361, 38 Pac. Rep. 1127; *Farmers' Ins. Co. v. Mispelhorn*, 50 Md. 180.

3. *Stephens v. Union Assur. Soc.*, 16 Utah, 22, 50 Pac. Rep. 626, 27 Ins. L. J. 165; *Aurora Ins. Co. v. Johnson*, 46 Ind. 315; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704.

RULE 5.

Duplicate not Certified Copy — Demand.

A duplicate is not a certified copy and the demand should follow the language of the condition to make it operative.

Insurance Cos. v. Weides, 14 Wall. (U. S.) 375.

RULE 6.

Objection Must Be Specific.

The insurance company must make demand for certified copies of invoices of goods, and if not certified when furnished, that specific objection must be made, otherwise it is waived;¹ and if specific objection is made it waives others.²

1. *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226; *Wells Whip Co. v. Tanners' Ins. Co.*, Pa. St., 58 Atl. Rep. 894.

2. *Sagers v. Hawkeye Ins. Co.*, 94 Iowa, 519, 63 N. W. Rep. 194.

RULE 7.

Place of Examination of Books.

The place of location of a trading concern where fire occurs is the proper place for the examination of its books;¹ the insurance company cannot demand their production at its office.²

1. *Fleisch v. Insurance Co. of N. A.*, 58 Mo. App. 596, 23 Ins. L. J. 634; *Murphy v. North B. & M. Ins. Co.*, 61 Mo. App. 323.
2. *American Central Ins. Co. v. Simpson*, 43 Ill. App. 98.

RULE 8.

When Policy Contains Iron Safe Clause.

Where the policy also contains the "iron safe clause" the production of books of account for examination is not excused by the reason that none were kept.

Niagara Ins. Co. v. Forehand, 169 Ill. 626, 48 N. E. Rep. 830. And see "Iron Safe Clause."

RULE 9.

Waiver of Forfeiture.

Demand for certified or duplicate bills, with knowledge of the facts forfeiting the policy or making it void according to its terms for violation of another condition, may operate as a waiver of the forfeiture when the assured is put to trouble or expense in obtaining them.

Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. Rep. 633. *Contra*, *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. Rep. 1003. And see "Waiver."

RULE 10.**Waiver of Limitation Clause.**

Demand for books, bills, and vouchers may operate as evidence of waiver of the limitation clause in the policy for commencement of suit thereon, where in compliance therewith it will take time extending beyond the prescribed period.

Dibrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. Rep. 783. And see *Bonnert v. Insurance Co.*, 129 Pa. St. 558.

RULE 11.**Effect of Failure to Produce Books and Vouchers.**

Failure to produce books and bills or invoices does not void the policy when it does not in terms make void for that reason or cause;¹ but may operate to prevent loss from becoming due and payable, and affect right to commence suit.²

1. *Lion Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. Rep. 45.

2. See "Payment of the Loss," Rule 1.

TITLE VI.**Iron Safe Clause.**

- RULE 1.** Clause requiring keeping and preservation of inventory and books reasonable and enforceable.
2. Promissory representation if not made part of policy.
 3. When a warranty — Construction.
 4. Tendency and weight of modern authority.
 5. Standard of care — Meaning of failure to produce inventory and books.
 6. Duty and diligence of assured — Question of fact.
 7. Assured responsible for negligence of employees.
 8. Inventory.
 9. General statement no substitute for inventory.
 10. Invoices not inventory.

- RULE 11.** Knowledge of agent no waiver.
 12. Knowledge may operate as an element in estoppel.
 13. Waiver by agent after issue of policy.
 14. Waiver by adjuster — Question of fact — Soliciting or local agent.
 15. Examination of books by adjuster no waiver.
 16. Nonwaiver agreement by assured.
 17. Destruction of safe and contents.
 18. Meaning of fire-proof safe.
 19. Violation of clause affects stock only.

In policies upon stocks of goods or merchandise there is frequently to be found a clause or rider requiring the insured to take an inventory, to keep books of account showing purchases and sales, cash-book, etc., and to keep same in a fire-proof safe. These clauses vary in terms, and the controversies in different parts of the country, as to their legal operative force and application, have developed so much difference of opinion among the judges that it is difficult if not impossible to reduce the subject to a system of rules. Thus it must be understood that in the following rules it is only attempted as far as possible to indicate general principles, specially in view of the modern tendency and weight of the decisions. The object of the clause is to secure means of ascertaining the loss in event of fire, and to facilitate an adjustment.

RULE 1.

Clause Requiring Keeping and Preservation of Inventory and Books Reasonable and Enforceable.

The clause in question, usually known as the "iron safe" clause, is a reasonable and proper provision which must be complied with;¹ a breach must be pleaded as an affirmative defense.²

1. *Niagara Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. Rep. 830; *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451, 30 So. Rep. 537; *Gibson v. Missouri Ins. Co.*, 82 Mo. App. 515; *Sowers v. Mutual Ins. Co.*, 113 Iowa, 551, 85 N. W. Rep. 763; *Fire Assoc. v. Masterson* (Tex. Civ. App.), 61 S. W. Rep. 962; *Hester v. Scottish Union & Nat. Ins. Co.*, 115 Ga. 454, 41 S. E. Rep. 552; *Keet-Rountree Dry Goods Co. v. Mercantile Ins. Co.* (Mo. App.), 74 S. W. Rep. 469; *German-American Ins. Co. v. Waters*, 10 Tex. Civ. App. 363, 30 S. W. Rep. 576; *Roberts v. Sun Mutual Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. Rep. 559; *Landman v. Hartford Ins. Co.* (La.), 18 Ins. L. J. 813; *Goldman v. North British & M. Ins. Co.*, 48 La. Ann. 223; *Virginia F. & M. Ins. Co.*

v. Morgan, 90 Va. 290, 18 S. E. Rep. 191; *Robinson v. Aetna Ins. Co.*, 135 Ala. 650, 34 So. Rep. 18; *Maupin v. Scottish Union & Nat. Ins. Co.*, 53 W. Va. 557, 45 S. E. Rep. 1003; *Gillum & Co. v. Fire Assoc.*, 106 Mo. App. 673, 80 S. W. Rep. 283; *St. Landry Co. v. New Hampshire Ins. Co.*, La. , 38 So. Rep. 87; *Everett Co. v. Traders' Ins. Co.*, Ga. , 48 S. E. Rep. 918; *Continental Ins. Co. v. Cummings*, Tex. , 81 S. W. Rep. 705; *Rundell & Hough v. Anchor Ins. Co.*, Iowa, , 101 N. W. Rep. 517; *King v. Concordia Ins. Co.*, Mich. , 103 N. W. Rep. 616.

2. *Tillis v. Liverpool, L. & G. Ins. Co.*, Fla. , 35 So. Rep. 171.

Exception.—The clause is inoperative in Kentucky, the courts in that State holding substantially that it is not competent to contract with the insured for the preservation of testimony. *Phoenix Ins. Co. v. Angel*, 38 S. W. Rep. 1067; *Mechanics & Traders' Ins. Co. v. Floyd*, 49 S. W. Rep. 543; *Germania Ins. Co. v. Ashby*, 65 S. W. Rep. 611; *Niagara Ins. Co. v. Heflin*, 60 S. W. Rep. 393; *Citizens' Ins. Co. v. Crist*, 56 S. W. Rep. 658.

(Of these cases only *Germania Ins. Co. v. Ashby* is to be officially reported, but the volume has not yet been issued.)

Under the Iowa statute (Code, § 1743), a breach must contribute to the loss. *Johnson v. Farmers' Ins. Co.*, Iowa, , 102 N. W. Rep. 502. But compare *Rundell & Hough v. Anchor Ins. Co.*, Iowa, , 101 N. W. Rep. 517, which seems to hold to the contrary.

RULE 2.

Promissory Representation if not Made Part of Policy.

Where it is not inserted in or made part of the policy or contract it amounts merely to a promissory representation, a violation of which must be *material* to vitiate the insurance.

Aetna Ins. Co. v. Norman, 12 Ind. App. 652, 40 N. E. Rep. 1116, 24 Ins. L. J. 611; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. Rep. 606; *Goddard v. East Texas Ins. Co.*, 67 Tex. 69, 1 S. W. Rep. 906.

RULE 3.

When a Warranty — Construction.

When inserted in the policy or made part of it, in legal effect the “safe clause” becomes a warranty; but whether in construing and applying the varying language of the clause to the facts and circumstances of each particular case, the doctrine of *strict and exact*¹ compliance or that of *substantial*² compliance shall pre-

vail, the courts do not agree. If construction doubtful it favors the insured.³

1. *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. Rep. 191; *Scottish Union & Nat. Ins. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. Rep. 180; *Goldman v. North British & M. Ins. Co.*, 48 La. Ann. 223, 19 So. Rep. 132, 25 Ins. L. J. 60; *Sun Mutual Ins. Co. v. Searles*, 73 Miss. 62, 18 So. Rep. 544; *Northwestern Nat. Ins. Co. v. Mize* (Tex.), 34 S. W. Rep. 670; *Farmers' Ins. Co. v. Bates*, 65 Ill. App. 37; *Lozano v. Palatine Ins. Co.*, 78 Fed. Rep. 278, 24 C. C. A. 85, 41 U. S. App. 694; *Liverpool, L. & G. Ins. Co. v. Kearney*, 94 Fed. Rep. 314, 36 C. C. A. 265. (The difference of opinion among the judges is well illustrated by the able dissenting opinion of Sanborn, C. J., in this case, p. 320.)

2. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. Rep. 104; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. Rep. 399, 28 Ins. L. J. 199; *Liverpool, L. & G. Ins. Co. v. Sheffy*, 71 Miss. 919, 16 So. Rep. 307; *Liverpool, L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. Rep. 1006; *McNutt v. Virginia F. & M. Ins. Co.* (Tenn.), 45 S. W. Rep. 61, *affd. orally* by Supreme Court, 45 S. W. Rep. 65; *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S. W. Rep. 1060, 36 S. W. Rep. 590, 591; *Western Ins. Co. v. Atheimer*, 58 Ark. 565, 25 S. W. Rep. 1067, 23 Ins. L. J. 513, 565; *American Central Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. Rep. 129, 27 Ins. L. J. 785; *Burnett v. American Central Ins. Co.*, 68 Mo. App. 343; *Meyer v. Insurance Co. of N. A.*, 73 Mo. App. 166; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. Rep. 832; *Western Assur. Co. v. Redding*, 68 Fed. Rep. 708, 15 C. C. A. 619, 30 U. S. App. 442; *Brown v. State Ins. Co.*, 74 Iowa, 428; *Jones v. Southern Ins. Co.*, 38 Fed. Rep. 19; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. Rep. 1034; *Pennsylvania Ins. Co. v. Brown* (Tex. Civ. App.), 36 S. W. Rep. 590; *Royal Ins. Co. v. Brown* (Tex. Civ. App.), 36 S. W. Rep. 591; *Major v. Ins. Co. of N. A.*, Mo. App. , 86 S. W. Rep. 883.

3. *Ætna Ins. Co. v. Fitze*, Tex. Civ. App. , 78 S. W. Rep. 370.

It is not a warranty under the Tennessee statute. *Continental Ins. Co. v. Whitaker*, Tenn. , 79 S. W. Rep. 119.

RULE 4.

Tendency and Weight of Modern Authority.

Where the insured in good faith has shown by his acts, disposition, or intent to comply with the clause, and endeavored to meet its requirements, but is prevented from literal and exact compliance by accident or misfortune, without fault or fraud, the tendency and weight of modern authority is in favor of the rule or doctrine of substantial performance. The courts are not inclined, under such circumstances, to declare a forfeiture of the entire insurance upon slight or unsubstantial departure from the literal or exact terms of the clause, specially where the insurance company is not prejudiced;¹ but the doctrine of substantial compliance has no application when there is no compliance whatever,² or when the assured has been guilty of negligence, or when books have been lost or destroyed through fault or design of the insured.³ Memoranda kept by other parties not compliance.⁴

1. *Merchants' Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Fire Assoc. v. Short*, 100 Ill. App. 553, 559; *Liverpool, L. & G. Ins. Co. v. Kearney*, 180 U. S. 132; *Western Assur. Co. v. Kemendo*, 94 Tex. 367, 60 S. W. Rep. 661. And see cases under Rule 3; *Connecticut Ins. Co. v. Jeary*, 60 Nebr. 338, 83 N. W. Rep. 78; *Ætna Ins. Co. v. Fitze*, Tex. Civ. App., 78 S. W. Rep. 370; *Virginia F. & M. Ins. Co. v. Cummings*, Tex. Civ. App., 78 S. W. Rep. 716; *Connecticut Ins. Co. v. Clark*, 24 Ohio Cir. 33; *Malin v. Mercantile Ins. Co.*, Mo. App., 80 S. W. Rep. 56; *First Nat. Bank v. Cleland*, Tex. Civ. App., 82 S. W. Rep. 337; *Phoenix Assur. Co. v. Stinson*, Tex. Civ. App., 79 S. W. Rep. 866; *Scottish Union & Nat. Ins. Co. v. Moore*, Tex. Civ. App., 81 S. W. Rep. 573; *Tucker v. Colonial Ins. Co.*, W. Va., 51 S. E. Rep. 86; *Newton v. Theresa Ins. Co.*, Wis., 104 N. W. Rep. 107.

2. Fire Assoc. v. Masterson (Tex.), 61 S. W. Rep. 962.
3. Fire Assoc. v. Calhoun (Tex.), 67 S. W. Rep. 153; Rives v. Fire Assoc., Tex. Civ. App., 77 S. W. Rep. 424.
4. Rives v. Fire Assoc., *supra*.

RULE 5.

Standard of Care — Meaning of Failure to Produce Inventory and Books.

Where assured has right of keeping in "some secure place not exposed to a fire," he does not lose the benefit of the insurance if in removing books and inventory to a safe place they are lost or destroyed, he using such care on the occasion as a prudent man, acting in good faith, would exercise. The failure to produce the books and inventory means a failure to produce them, if they are in existence when called for, or if they have been lost or destroyed by fault, negligence, or design of the insured.

Liverpool, L. & G. Ins. Co. v. Kearney, 180 U. S. 132, affg. 94 Fed. Rep. 314, 36 C. C. A. 265; Western Assur. Co. v. Kemendo, 94 Tex. 367, 60 S. W. Rep. 661.

RULE 6.

Duty and Diligence of Assured — Question of Fact.

The insured is required to preserve, and, in case of fire, to produce, the books of account and inventories, their preservation being solely for the purpose of enabling the assured to produce them when required. On all ordinary occasions when the store is not open for business the insured should strictly comply with the condition to insure their preservation. In case of

sudden emergency the insured must exercise all reasonable diligence to effect the main end of the iron safe clause; that is, to put the books in a place of safety, so that they can be produced for the inspection of the company's agents after the fire. Whether such diligence requires the placing of books in the safe or their removal from the building, and whether the insured used such diligence is a question of fact to be determined by a jury.

Phoenix Ins. Co. *v.* Schwartz, 115 Ga. 113, 41 S. E. Rep. 240, 57 L. R. A. 752. And see *First Nat. Bank v. Cleland*, Tex. Civ. App. , 82 S. W. Rep. 337. And that the question of compliance with the clause or condition may be proper to submit to a jury, see also *Madden v. Phoenix Assur. Co.*, S.C. , 49 S. E. Rep. 855.

RULE 7.

Assured Responsible for Negligence of Employees.

The assured is responsible for the negligence of his employees in the performance of the clause requiring safe-keeping of inventory and books.

Western Assur. Co. v. Kemendo, 94 Tex. 367, 60 S. W. Rep. 661.

RULE 8.

Inventory.

As to the inventory required by the "iron safe clause," that made on purchase of the goods or merchandise is not the one contemplated, so its nonproduction does not constitute a breach;¹ and where no

precise time is prescribed for its taking the courts are liberal in construction — a reasonable time² after issue of the policy, and this has been held to extend to even a year;³ accidental loss of inventory or books during progress of a fire in endeavor to remove to a place of safety excuses nonproduction, when assured has option under the clause of keeping in safe or in “some secure place.”⁴ A summary of an inventory is not sufficient.⁵ When required it must be produced.⁶ When time to take is prescribed and loss occurs before expiration of such time, a rough, incomplete inventory will not be construed as one which the insured is required to keep and produce.⁷

1. *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. Rep. 932; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161, 169 Ill. 626.

2. *Allen v. Milwaukee Mechanics' Ins. Co.*, 106 Mich. 204, 64 N. W. Rep. 15.

3. *McCollum v. Niagara Ins. Co.*, 61 Mo. App. 352; *Hanover Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. Rep. 772; *Howerton v. Iowa State Ins. Co.*, Mo. App. , 80 S. W. Rep. 27. And see *Tucker v. Colonial Ins. Co.*, W. Va. , 51 S. E. Rep. 86.

4. *Liverpool, L. & G. Ins. Co. v. Kearney*, 94 Fed. Rep. 314, 36 C. C. A. 265; *East Texas Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. Rep. 720.

5. *Roberts v. Sun Mutual Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. Rep. 559; *Gillum & Co. v. Fire Assoc.*, 106 Mo. App. 673, 80 S. W. Rep. 283.

6. *Continental Ins. Co. v. Cummings*, Tex. , 81 S. W. Rep. 705.

7. *St. Landry Mercantile Co. v. Teutonia Ins. Co.*, La. , 37 So. Rep. 967.

RULE 9.**General Statement no Substitute for Inventory.**

An inventory means an itemized list or enumeration of property, article by article, and a general statement such as "Houston bill," "hardware," "Marble City Drug Co.," "oil and turpentine in bulk," and "show case and contents," cannot be regarded as a substitute, or as a substantial compliance with condition requiring it.

Fire Assoc. v. Calhoun, 28 Tex. Civ. App. 409, 67 S. W. Rep. 153; Delaware Ins. Co. v. Monger, Tex. Civ. App. , 74 S. W. Rep. 792.

RULE 10.**Invoices not Inventory.**

Invoices do not constitute a substitute of itemized inventory required by the safe clause;¹ nor do cash strips from a cash register constitute a set of books.² Nor do extracts from books.³ Nor does a bank pass-book show cash sales.⁴

1. Fire Assoc. v. Masterson, 25 Tex. Civ. App. 518, 61 S. W. Rep. 962; Southern Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. Rep. 821.

2. Monger v. Delaware Ins. Co., Tex. , 79 S. W. Rep. 7.

3. St. Landry Co. v. New Hampshire Ins. Co., La. , 38 So. Rep. 87.

4. Gillum & Co. v. Fire Assoc, 106 Mo. App. 673, 80 S. W. Rep. 283.

RULE 11.**Knowledge of Agent no Waiver.**

Mere knowledge or verbal permission otherwise by the company's agent before issue and delivery of the

policy containing the "iron safe" clause does not operate as a waiver of its provisions.

Virginia F. & M. Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. Rep. 191; *Germania Ins. Co. v. Brownwell*, 62 Ark. 43, 34 S. W. Rep. 83, 25 Ins. L. J. 372; *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. Rep. 595, 28 Ins. L. J. 502; *Northwestern Nat. Ins. Co. v. Mize* (Tex.), 34 S. W. Rep. 670; *Crigler v. Standard Ins. Co.*, 49 Mo. App. 11; *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 So. Rep. 143; *Rundell v. Anchor Ins. Co.*, Iowa, 101 N. W. Rep. 517; *Gillum v. Fire Assoc.*, 106 Mo. App. 673, 80 S. W. Rep. 283. See also "Waiver."

RULE 12.

Knowledge May Operate as an Element in Estoppel.

Issue of policy with knowledge of a then existing breach of the clause or condition may operate as an estoppel.

Niagara Ins. Co. v. Brown, 123 Ill. 356, 15 N. E. Rep. 166, affg. 24 Ill. App. 224; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 So. Rep. 86; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. Rep. 583; *Madden v. Phoenix Assur. Co.*, S. C., 49 S. E. Rep. 855. *Contra*, *Maupin v. Scottish Union & Nat. Ins. Co.*, 53 W. Va. 557, 45 S. E. Rep. 1003. See "Waiver," Rule 8, and *note*.

RULE 13.

Waiver by Agent After Issue of Policy.

An agent authorized to make, sign, and issue policies, who does so with "safe and book" clause attached, may subsequently, before a fire, modify or dispense with its provisions, either wholly or in part, and waiver or estoppel may result therefrom,¹ unless his authority is in terms limited by the policy.²

1. *Niagara Ins. Co. v. Brown*, 123 Ill. 356, 15 N. E. Rep. 166, affg. 24 Ill. App. 224; *German Ins. Co. v. Allen*, Kans.

, 77 Pac. Rep. 529; *Fire Assoc. v. Masterson*, Tex. Civ. App. , 83 S. W. Rep. 49.

2. *Roberts v. Sun Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. Rep. 955. This case seems to be overruled by subsequent decisions in Texas. See *Fire Assoc. v. Masterson*, *supra*, and "Waiver," Rule 28, and Vol. 2, "Agents."

RULE 14.

Waiver by Adjuster—Question of Fact—Soliciting or Local Agent.

An adjuster, having knowledge of the facts, waives compliance with the "iron safe" clause, by requiring from the insured additional or supplemental proofs of loss;¹ examining books and papers of insured and causing him to procure data under provisions of the policy;² demand for production of invoices and bills;³ the question of waiver of the "iron safe" clause, arising out of conduct of the adjuster and of the company, is one of fact for a jury;⁴ a soliciting or local agent, having no authority as to losses, cannot waive the clause.⁵ A promise to pay amount of adjustment is a waiver.⁶ Knowledge of the adjuster is an essential element.⁷ There is no waiver in examination of the insured under specific condition in policy.⁸

1. *Parsons v. Knoxville Ins. Co.*, 132 Mo. 583, 31 S. W. Rep. 117, 24 Ins. L. J. 852; *Couch v. Home Protection Ins. Co.* (Tex. Civ. App.), 73 S. W. Rep. 1077; *German Ins. Co. v. Allen*, Kans. , 77 Pac. Rep. 529.

2. *McCollum v. Niagara Ins. Co.*, 61 Mo. App. 352; *Bowen v. Hanover Ins. Co.*, 69 Mo. App. 272; *Brown v. State Ins. Co.*, 74 Iowa, 428; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. Rep. 399. And see "Waiver."

3. *Roberts v. Sun Mutual Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. Rep. 955; writ of error denied, 37 S. W. Rep. 311; *Corson v. Anchor Ins. Co.*, 113 Iowa, 641, 85 N. W. Rep. 806.

4. *Curnow v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. Rep. 74.

5. German-American Ins. Co. v. Waters, 10 Tex. Civ. App. 363, 30 S. W. Rep. 576.

6. Tillis v. Liverpool, L. & G. Ins. Co., Fla. , 35 So. Rep. 171.

7. Continental Ins. Co. v. Cummings, Tex. , 81 S. W. Rep. 705, revg. 78 S. W. Rep. 378.

8. American Central Ins. Co. v. Nunn, Tex. , 82 S. W. Rep. 497, revg. 79 S. W. Rep. 88. See "Examination."

RULE 15.

Examination of Books by Adjuster no Waiver.

An examination by adjuster of assured's books does not of itself waive a forfeiture on ground of not taking or furnishing an inventory pursuant to a safe clause, where no demand is made for proofs of loss.

Fire Assoc. v. Masterson, 25 Tex. Civ. App. 518, 61 S. W. Rep. 962.

RULE 16.

Nonwaiver Agreement by Assured.

An adjuster desiring to proceed in discharge of his duty in ascertaining the loss, notwithstanding failure of the insured to show a compliance with the "iron safe" clause, if he desires to avoid a claim of waiver, should take a written stipulation or agreement from the assured, that his investigation, acts, or declarations for such purpose shall not be construed as a waiver.

Roberts v. Sun Mutual Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. Rep. 559. And see "Waiver."

RULE 17.

Destruction of Safe and Contents.

The fact that the *safe* and its contents, including inventory and books, are destroyed by the fire, is sufficient to excuse compliance with the clause; the term

“ fire-proof safe ” in such a clause does not mean a safe certainly proof against fire.

Sneed v. British-American Ins. Co., 73 Miss. 279, 18 So. Rep. 928; *Knoxville Ins. Co. v. Hird*, 4 Tex. Civ. App. 182, 23 S. W. Rep. 693, 23 Ins. L. J. 16; *Liverpool, L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, affg. 94 Fed. Rep. 314, 36 C. C. A. 265.

RULE 18.

Meaning of Fire-proof Safe.

A fire-proof safe does not mean one that is absolutely sufficient against every fire that might occur; it is sufficient if the safe was such as was commonly used and such as, in the judgment of prudent men in the locality of the property insured, was sufficient.

Liverpool, L. & G. Ins. Co. v. Kearney, 180 U. S. 132, affg. 94 Fed. Rep. 314, 36 C. C. A. 265; *Fire Assoc. v. Short*, 100 Ill. App. 553, 559; *Underwriters' Assoc. v. Palmer* (Tex. Civ. App.), 74 S. W. Rep. 603. And see Rule 17.

RULE 19.

Violation of Clause Affects Stock Only.

A violation of this clause affects stock of goods only; it does not affect the insurance on other items, as building, furniture, or fixtures, etc.

Hanover Ins. Co. v. Crawford, 121 Ala. 258, 25 So. Rep. 512, 28 Ins. L. J. 945; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 So. Rep. 86; *Roberts v. Sun Mutual Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. Rep. 955; writ of error denied, 37 S. W. Rep. 311; *Sun Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. Rep. 180; *Landman v. Hartford Ins. Co. (La.)*, 19 Ins. L. J. 572; *Continental Ins. Co. v. Cummings*, Tex., 81 S. W. Rep. 705; *Miller v. Delaware Ins. Co.*, Okla., 75 Pac. Rep. 1121, 65 L. R. A. 172. And see this volume, “Construction,” Rule 26 and note.

TITLE VII.

Fraud or False Swearing.

- RULE 1.** Effect of fraud or false swearing as imposed by contract.
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RULE 1.

Effect of Fraud or False Swearing as Imposed by Contract.

The policy becomes void in case of any fraud or false swearing by the insured touching any matter re-

lating to the insurance, or the subject thereof, whether before or after a loss.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

provides that the policy shall be void "if the insured shall make any attempt to defraud the company, either before or after the loss."

The South Dakota form provides that "this policy shall be void if the amount of loss shall be fraudulently concealed or misrepresented by the insured."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Must be Fraudulent Intent.

Mere falsity of a sworn statement is not sufficient to void the policy, if not made with intent to defraud; the false swearing which voids the insurance must be done willfully and knowingly and with intent to defraud the company;¹ but knowledge and intent may be inferred from the circumstances,² and assured cannot escape the consequences of fraud by adopting and swearing to a detailed fraudulent statement without examination.³

1. *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. Rep. 712, 26 Ins. L. J. 320; *Beyer v. St. Paul F. & M. Ins. Co.*, 112

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

Wis. 138, 88 N. W. Rep. 57; *Hilton v. Phoenix Ins. Co.*, 92 Me. 272, 42 Atl. Rep. 412; *American Central Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. Rep. 129, 27 Ins. L. J. 785; *Phoenix Ins. Co. v. Swann (Tex.)*, 41 S. W. Rep. 519; *West Coast Lumber Co. v. State Investment Co.*, 98 Cal. 502, 33 Pac. Rep. 258, 22 Ins. L. J. 681; *Tubb v. Liverpool, L. & G. Ins. Co.*, 106 Ala. 651, 17 So. Rep. 615, 25 Ins. L. J. 365; *Dunn v. Springfield F. & M. Ins. Co.*, 109 La. 520, 33 So. Rep. 585; *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. Rep. 850; *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. Rep. 743; *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Franklin Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Marion v. Great Republic Ins. Co.*, 35 Mo. 148; *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 89; *Hornthal v. Western Ins. Co.*, 88 N. C. 71; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Tiefenthal v. Citizens' Ins. Co.*, 53 Mich. 306; *Watertown Ins. Co. v. Graham*, 74 Ga. 642; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Knop v. National Ins. Co.*, 107 Mich. 323; *Phoenix Ins. Co. v. Summerfield*, 70 Miss. 827, 13 So. Rep. 253; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209; *Garner v. Mutual Ins. Co.*, Iowa, , 86 N. W. Rep. 289; *Rohrbach v. Aetna Ins. Co.*, 62 N. Y. 613; *Farmers' Ins. Co. v. Gargett*, 42 Mich. 289; *Cheever v. Scottish Union Ins. Co.*, 86 App. Div. 328, 83 N. Y. Supp. 730; *Dalton v. Milwaukee Mechanics' Ins. Co.*, Iowa, , 102 N. W. Rep. 120; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Newton v. Theresa Ins. Co.*, Wis. , 104 N. W. Rep. 107; *Nugent v. Rensselaer Ins. Co.*, App. Div. , 94 N. Y. Supp. 605.

2. *Virginia Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 754; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 95; *Sternfield v. Park Ins. Co.*, 50 Hun. 262.

3. *Mullin v. Mutual Ins. Co.*, 58 Vt. 113, 54 Vt. 223. And see *Knop v. National Ins. Co.*, 127 Mich. 323. See also Rule 3.

RULE 3.

What Fraud or False Swearing Means.

Fraud or false swearing implies something more than mistake of fact or honest misstatements on part of assured. They may consist in knowingly and intentionally stating upon oath what is not true, or a statement of a fact as true which the party does not know

to be true, and which he has no reasonable ground of believing to be true.

Atherton v. British-American Assur. Co., 91 Me. 289, 39 Atl. Rep. 1006. And see *Leach v. Republic Ins. Co.*, 58 N. H. 245; *Sleeper v. New Hampshire Ins. Co.*, 56 N. H. 401; *Petty v. Mutual Ins. Co.*, 111 Iowa, 358, 82 N. W. Rep. 767; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. Rep. 324, 27 Ins. L. J. 19, and cases cited under Rule 2.

RULE 4.

Mistake or Reliance on Information.

It is not enough that the false swearing occurs through mistake, carelessness, or inadvertence, or even in unreasonable reliance upon information derived from others.

Beyer v. St. Paul F. & M. Ins. Co., 112 Wis. 138, 98 N. W. Rep. 57.

RULE 5.

Effect of Intentional Attempt to Defraud.

A deliberate intentional and fraudulent attempt to impose a loss not sustained upon the insurance company defeats recovery.

Schmidt v. Philadelphia Underwriters, 109 La. 884, 33 So. Rep. 907; *Bannon v. Ins. Co. of N. A.*, 115 Wis. 250, 91 N. W. Rep. 666; *Hall v. Western Underwriters' Assoc.*, 106 Mo. App. 476, 81 S. W. Rep. 227; *Rovinsky v. Northern Assur. Co.*, Me. , 60 Atl. Rep. 1025.

RULE 6.

Effect not Obviated by Amount of Loss.

The effect of false swearing is not obviated or removed by the fact that the actual loss truly stated equals or exceeds the amount of insurance;¹ but when the insurance company has *paid* the loss, and seeks to recover money back on ground of false swearing as to *value*, then if the actual loss equals or exceeds the

amount paid the company is not injured² and same principle applies to a settlement as to value.³

1. *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266, 19 Atl. Rep. 396; *Capital Ins. Co. v. Beverly*, 14 Ohio C. C. 468.

2. *London & Lancashire Ins. Co. v. Liebes*, 105 Cal. 203, 38 Pac. Rep. 691.

3. *Commercial Bank v. Fireman's Ins. Co.*, 87 Wis. 297, 58 N. W. Rep. 391, 23 Ins. L. J. 543; *Home Ins. Co. v. Lowenthal*, Miss. , 36 So. Rep. 1042.

Exception.—In Nebraska the rule is that a recovery is not barred by fraud or false swearing in the proofs of loss when the actual value is greater than the aggregate insurance. *Home Ins. Co. v. Winn*, 42 Nebr. 334; *Springfield Ins. Co. v. Winn*, 27 Nebr. 649, 43 N. W. Rep. 401. See Rule 14.

RULE 7.

Not Necessary to Establish Beyond Reasonable Doubt — May be Inferred.

It is not necessary to establish fraud beyond a reasonable doubt. Fraud need not have all the elements necessary to sustain an action for deceit; but any trick, or artifice, or deception practiced, with the object of securing some advantage in the adjustment or payment of the loss to the prejudice of the company, and liable to have that effect, avoids the policy;¹ it may be established by presumption or inference from facts proved or circumstantial evidence;² nor does it depend upon the fact that the company was actually deceived or misled,³ nor upon specific intent to gain excess in valuation.⁴ Insured's financial condition may be relevant.⁵

1. *Dohman Co. v. Niagara Ins. Co.*, 96 Wis. 38, 71 N. W. Rep. 69, 27 Ins. L. J. 357.

2. *North British & M. Ins. Co. v. Tourville*, 25 Can. S. C. 177.

3. *Fowler v. Phoenix Ins. Co.*, 35 Oreg. 559, 57 Pac. Rep. 421, 28 Ins. L. J. 681; *Virginia Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 754; *Bannan v. Ins. Co. of N. A.*, 115 Wis. 250, 91 N. W. Rep. 666.

4. *Sleeper v. New Hampshire Ins. Co.*, 56 N. H. 401.

5. *Rickerman v. Williamsburg Ins. Co.*, 120 Wis. 655, 98 N. W. Rep. 960.

RULE 8.**When Proved by Circumstantial Evidence.**

Where, in an action upon the policy, fraud is sought to be proved by circumstantial evidence, it is error for the trial court to instruct the jury that "all of the circumstances must point to the one thing claimed and admit of no other reasonable explanation," because such an instruction requires the fraud to be established beyond a reasonable doubt.

Knop v. National Ins. Co., 107 Mich. 323, 25 Ins. L. J. 181, 65 N. W. Rep. 228.

RULE 9.**Statement Must be Material—Slight Exaggerations.**

The false statement or swearing by the assured subsequent to the loss must be shown to be material before it can be claimed to avoid the policy;¹ if the company has knowledge of facts a false statement in regard thereto cannot reasonably deceive or mislead it;² and so, if a settlement has been agreed upon as to value or amount, and it is shown to be true and correct, alterations or erasures in books become immaterial;³ so overvaluation of *itself* is not material;⁴ it is not every slightest possible exaggeration of amount or value, even if knowingly and willfully made, that will avoid the policy.⁵

1. *Feibelman v. Manchester Assur. Co.*, 108 Ala. 180, 19 So. Rep. 540; *Jones v. Mechanics' Ins. Co.*, 36 N. J. L. 29; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Parker v. Amazon Ins. Co.*, 34 Wis. 363; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Claffin v. Insurance Co.*, 110 U. S. 81; *Sleeper v. New Hampshire Ins. Co.*, 36 N. H. 101; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 161; *Marion v.*

Great Republic Ins. Co., 35 Mo. 148; *Mullin v. Vermont Ins. Co.*, 58 Vt. 113.

2. *German Ins. Co. v. Lucket*, 12 Tex. Civ. App. 139, 34 S. W. Rep. 173; *Westchester Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140, 57 S. W. Rep. 876; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Cary v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. Rep. 920; *Rohrbach v. Aetna Ins. Co.*, 62 N. Y. 613; *Farmers' Ins. Co. v. Gargett*, 42 Mich. 289.

3. *Commercial Bank v. Fireman's Ins. Co.*, 87 Wis. 297, 58 N. W. Rep. 391, 23 Ins. L. J. 543.

4. *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. Rep. 850; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582, 15 N. E. Rep. 112; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. Rep. 668; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 23 N. E. Rep. 498; *Gerhauser v. North British & M. Ins. Co.*, 6 Nev. 15.

5. *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. Rep. 388, 26 Ins. L. J. 782.

RULE 10.

Alterations and Erasures in Books.

Alterations and erasures in books are not conclusive upon an issue of fraud or false swearing; it is competent for the assured or his agent who made them to testify as to the intent in making them;¹ but the question of fraudulent alteration is one which should be left to a jury.²

1. *Commercial Bank v. Fireman's Ins. Co.*, 87 Wis. 297, 58 N. W. Rep. 391, 23 Ins. L. J. 543. And see *Weide v. Germania Ins. Co.*, 1 Dill. (U. S.) 441.

2. *Kelly v. Indemnity Ins. Co.*, 38 N. Y. 322; *Bannon v. Ins. Co. of N. A.*, 115 Wis. 250, 91 N. W. Rep. 666.

RULE 11.

Fraud by Agent of Insured.

Fraud or false swearing cannot be predicated upon the statements or acts of an agent of assured unless

known to and acquiesced in by the assured;¹ nor can he be made responsible for fraud or attempted fraud of an agent upon the theory that the agent is included in the term "legal representative."²

1. *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. Rep. 743. And see *Mullin v. Vermont Ins. Co.*, 58 Vt. 113.

2. *Metzger v. Manchester Assur. Co.*, 102 Mich. 334, 63 N. W. Rep. 650.

RULE 12.

Effect of Difference in Amount Sworn to in Proofs and on Trial.

The mere fact of difference between the amount or value as sworn to in the proofs of loss and the actual cash value as sworn to in a trial,¹ or by appraisal,² does not of itself establish fraud or false swearing, although it may require submission of the question to a jury; and while the difference, as established by their verdict, does not necessarily require setting of same aside,³ yet it may be so material under the circumstances of the case as to establish the fraud and false swearing, and to induce the trial court to set aside the verdict.⁴

1. *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. Rep. 183, 24 Ins. L. J. 789, affg. 57 Ill. App. 372; *Obersteller v. Commercial Assur. Co.*, 96 Cal. 645, 31 Pac. Rep. 587, 22 Ins. L. J. 392; *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. Rep. 583; *Davis v. Guardian Assur. Co.*, 87 Hun, 414, 34 N. Y. Supp. 332. And see *Oshkosh Provision Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200; *Williams v. Phoenix Ins. Co.*, 61 Me. 67; *Unger v. People's Ins. Co.*, 4 Daly, 96; *Israel v. Teutonia Ins. Co.*, 28 La. Ann. 689; *Schulter v. Merchants' Ins. Co.*, 62 Mo. 236; *Dogge v. Northwestern Ins. Co.*, 49 Wis. 501; *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375; *Sternfeld v. Park Ins. Co.*, 50 Hun, 262; *Goldstein v. Franklin Ins. Co.*, 170 Mass. 243.

2. *Dolan v. Aetna Ins. Co.*, 22 Hun, 396.

3. *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174; *Obersteller v. Commercial Ins. Co.*, 96 Cal. 645, 31 Pac. Rep.

587; *Wolf v. Goodhue Ins. Co.*, 43 Barb. 400; *Williams v. Phoenix Ins. Co.*, 61 Me. 67; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 41 N. E. Rep. 183; *Davis v. Guardian Assur. Co.*, 87 Hun, 414, 34 N. Y. Supp. 332; *Goldstein v. St. Paul F. & M. Ins. Co.*, Iowa, , 99 N. W. Rep. 696.

4. *Furlong v. Agricultural Ins. Co.*, 64 Hun, 632, 18 N. Y. Supp. 844, 28 Abb. N. C. 444; *Anibal v. Insurance Co. of N. A.*, 84 App. Div. 634, 82 N. Y. Supp. 600; *Sternfield v. Park Ins. Co.*, 50 Hun, 262; *Wall v. Howard Ins. Co.*, 51 Me. 32. And see to same effect, *Levy v. Baillie*, 7 Bing. (Eng.) 349.

RULE 13.

Actual Extent of Loss Relevant on Question of Intent.

But the actual value or extent of the loss may be an element proper for consideration in determining whether the statement claimed to be fraudulent was willfully false or an error of judgment, misinformation, misrecollection, or mistake, as bearing on intent.

Hanscom v. Home Ins. Co., 90 Me. 333, 350.

RULE 14.

Raising Amounts in Invoices — False Statements as to Property or Interest.

The willful raising of amounts in copies of invoices furnished, and verification of same by sworn statement or affidavit, is such false swearing and attempt at fraud as to void the insurance;¹ and so, where the assured swears to double the actual value of a house, and includes items which were *not* in the house;² and so, where he falsely swears that no one besides himself had any interest therein, though the intent may be required to be submitted to a jury.³

1. *Home Ins. Co. v. Winn*, 42 Nebr. 331, 60 N. W. Rep. 575, 24 Ins. L. J. 126. And see *Virginia Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 754, subsequent appeal, 46 id. 692.

2. *West v. British-America Assur. Co.* (U. S. Cir.), 25 Ins. L. J. 689.

3. *Grettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. Rep. 627, 27 Ins. L. J. 160.

RULE 15.

What is not Fraud or False Swearing.

It is not fraud and false swearing for the assured to swear in his proofs that the property was burned or destroyed by fire, when in fact the loss and damage was caused by smoke and water;¹ nor is it established by omission of assured to include or state in proofs a policy which, before the fire, had been recalled for cancellation, but not actually canceled until after the fire;² nor can it be predicated on a false statement in proofs prepared by company's adjuster and not read by assured;³ nor is an overestimate of a loss, based upon a wrong theory, necessarily fraudulent;⁴ and so with any innocent exaggerated mistake in valuation,⁵ or omission founded on mistaken belief,⁶ or insertion of articles by mistake.⁷

1. *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401.

2. *Gough v. Davis*, 24 Misc. 245, 52 N. Y. Supp. 947, *affd.*, no opinion, 39 App. Div. 639.

3. *Home Ins. Co. v. Mendenhall*, 64 Ill. App. 30, *affd.*, 164 Ill. 458, 45 N. E. Rep. 1078. And see *Dogge v. Northwestern Ins. Co.*, 49 Wis. 501.

4. *Hilton v. Phoenix Assur. Co.*, 92 Me. 272, 42 Atl. Rep. 412.

5. *Hubbard v. North B. & M. Ins. Co.*, 57 Mo. App. 1; *Phoenix Ins. Co. v. Sherman*, 17 Tex. Civ. App. 456, 43 S. W. Rep. 930; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. Rep. 326, 28 Ins. L. J. 326; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300. And see Rule 12.

6. *Thierolf v. Universal Ins. Co.*, 110 Pa. St. 37, 20 Atl. Rep. 412. And see *Towne v. Springfield Ins. Co.*, 145 Mass. 582, 15 N. E. Rep. 112.

7. *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. Rep. 296; *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. Rep. 389.

RULE 16.

Claiming Money Payable to Third Party — Statements as to Title.

Claiming under oath moneys which insured knows belongs to party to whom loss payable as interest may appear, may be evidence of attempted fraud;¹ and so assured may be guilty of fraud and false swearing when he states in the proofs of loss that his title is absolute and unincumbered, when it is subject to a lien for entire amount,² but not when he merely omits to mention a lien without fraudulent intent.³

1. *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa, 193, 18 N. W. Rep. 888.

2. *Security Ins. Co. v. Bronger*, 69 Ky. 146.

3. *Dresser v. United Firemen's Ins. Co.*, 45 Hun, 298, affd. without opinion, 122 N. Y. 642; *Thierolf v. Universal Ins. Co.*, 110 Pa. St. 37, 20 Atl. Rep. 412.

RULE 17.

Not Fraud to Pay Premium After Loss.

It is not fraud to pay the premium after an oral contract of insurance and after a loss without disclosing it.

Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. Rep. 540. And see opinion below, 59 Ill. App. 432.

RULE 18.**Question of Fact for Jury.**

Whether statements in proofs of loss were made understandingly as an attempt to defraud the insurance company, is ordinarily a question of fact for a jury;¹ the burden of proof rests upon the insurance company.²

1. *Home Ins. Co. v. Field*, 53 Ill. App. 119; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673. And see *Levi v. Brooklyn Ins. Co.*, 25 Wend. 687; *Hurd v. St. Paul Ins. Co.*, 39 Mich. 443; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Goldstein v. St. Paul F. & M. Ins. Co.*, Iowa, , 99 N. W. Rep. 696; *Burge v. Greenwich Ins. Co.*, Mo. App. , 80 S. W. Rep. 342; *Herzog v. Palatine Ins. Co.*, Wash. , 79 Pac. Rep. 287.

2. *Cheever v. British-Amer. Ins. Co.*, 86 App. Div. 333, 83 N. Y. Supp. 728.

RULE 19.**Waiver of Forfeiture.**

If the insurance company, with knowledge of the facts, delivers a draft in payment of the loss, it operates as waiver of any forfeiture founded upon fraud or false swearing relating to or connected with such facts;¹ but if delivered without knowledge, and discovered before acceptance and payment, then fraud in adjustment of the loss may be a good defense;² and so where the insurance company has accepted orders of the insured which have not been paid.³

1. *West Coast Lumber Co. v. State Investment Ins. Co.*, 98 Cal. 502, 33 Pac. Rep. 258, 22 Ins. L. J. 681.

2. *Anderson v. Stapel*, 80 Mo. App. 115.

3. *Omaha Ins. Co. v. Thomson*, 50 Nebr. 580, 70 N. W. Rep. 30.

RULE 20.**Fraud Voids Entire Contract.**

Fraud, when established, voids the whole sum otherwise due under the contract and not merely the particular item to which it related.

Hamberg v. St. Paul F. & M. Ins. Co., 68 Minn. 335; *Home Ins. Co. v. Connelly*, 104 Tenn. 93, 56 S. W. Rep. 828; *Moore*

v. Virginia Ins. Co., 28 Gratt. (Va.) 508; *Moore v. Firemen's Fund Ins. Co.*, 28 Gratt. (Va.) 524. And see *Oshkosh Packing Co. v. Merchants' Ins. Co.*, 31 Fed. Rep. 200; *Dohman Co. v. Niagara Ins. Co.*, 96 Wis. 38, 71 N. W. Rep. 69, 27 Ins. L. J. 357; *Miller v. Delaware Ins. Co.*, Okla., 75 Pac. Rep. 1121, 65 L. R. A. 172; *Hall v. Western Underwriters' Assoc.*, 106 Mo. App. 476, 81 S. W. Rep. 227; *Worachek v. New Denmark Ins. Co.*, 102 Wis. 88, 78 N. W. Rep. 411. See Rule 22, and "Construction."

RULE 21.

Intentional Fire Caused by Insured.

If fire is caused by insured while insane it is no defense to an action upon the policy;¹ otherwise, if sane and caused by his voluntary act, assent, procurement, or design,² but not when willfully caused by a third party without assured's knowledge;³ and so husband or wife can willfully burn each other's property without voiding the insurance, unless the other insured is privy and party to same;⁴ willful burning may be established by circumstantial evidence⁵ and by preponderance of evidence; it is not necessary to prove the offense beyond a reasonable doubt, as required in a criminal prosecution.⁶ It is no defense that fire was caused by the negligence of insured, unless willful or fraudulent.⁷

1. *Karow v. Continental Ins. Co.*, 57 Wis. 56; *Autremont v. Fire Assoc.*, 65 Hun, 475, 20 N. Y. Supp. 344.

2. *Karow v. Continental Ins. Co.*, 57 Wis. 56.

3. *Grant v. Elliot Ins. Co.*, 76 Me. 514; *Feibelman v. Manchester Ins. Co.*, 108 Ala. 180, 19 So. Rep. 540; *Perry v. Mechanics' Ins. Co.*, 11 Fed. Rep. 485; *Gove v. Farmers' Ins. Co.*, 48 N. H. 41; *Union Ins. Co. v. McCullough*, Nebr., 96 N. W. Rep. 79; *Malin v. Mercantile Ins. Co.*, Mo. App., 80 S. W. Rep. 56.

4. *Perry v. Mechanics' Ins. Co.*, 11 Fed. Rep. 485; *Gove v. Farmers' Ins. Co.*, 48 N. H. 41; *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. Div. 561; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209.

5. *Droyer v. Continental Ins. Co.*, 63 Tex. 354; *Farmers' Ins. Co. v. Crampton*, 43 Mich. 421; *Hotchkiss v. Germania Ins. Co.*, 5 Hun. 90; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120; *McWilliams v. Cascade Ins. Co.*, 7 Wash. 48, 34 Pac. Rep. 140; *Agnew v. Farmers' Ins. Co.*, 95 Wis. 445, 70 N. W. Rep.

554; *Joy v. Liverpool, L. & G. Ins. Co.* (Tex. Civ. App.), 74 S. W. Rep. 822.

6. *Continental Ins. Co. v. Jacknichen*, 110 Ind. 59; *Somerset Ins. Co. v. Usaw*, 112 Pa. St. 80; *Behrens v. Germania Ins. Co.*, 58 Iowa, 26; *Johnson v. Agricultural Ins. Co.*, 25 Hun, 251; *Monaghan v. Agricultural Ins. Co.*, 53 Mich. 238; *Rothschild v. American Central Ins. Co.*, 62 Mo. 356; *Blaesser v. Milwaukee Ins. Co.*, 37 Wis. 31; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.), 587; *Kane v. Hibernia Ins. Co.*, 10 Vroom (N. J.), 697; *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. C. 821, 21 S. E. Rep. 922. And see *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213, 27 L. R. A. 86.

7. *St. Paul F. & M. Ins. Co. v. Owens*, Kans., 77 Pac. Rep. 544; *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. Rep. 54.

RULE 22.

Effect of Statute Fixing Amount of Loss.

In case of total loss of building, when the insurance company is liable for full amount written under statute, it is no defense that assured fraudulently stated an excessive valuation in his proofs of loss;¹ but otherwise as to its contents or personal property; fraud in connection therewith voids the entire policy,² but otherwise void as to personalty only when insured by specified amount in separate item.³

1. *German Ins. Co. v. Jansen*, 18 Tex. Civ. App. 190, 45 S. W. Rep. 220; *Sullivan v. Hartford Ins. Co.*, 89 Tex. 665, 36 S. W. Rep. 73, 25 Ins. L. J. 705; *Barnard v. People's Ins. Co.*, 66 N. H. 401, 29 Atl. Rep. 1033; *Cayon v. Dwelling-House Ins. Co.*, 68 Wis. 510, 32 N. W. Rep. 540. Otherwise under the Missouri statute. *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209.

2. *Oshkosh Provision Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200. And see *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266, 19 Atl. Rep. 396.

3. *Sullivan v. Hartford Ins. Co.*, 89 Tex. 665, 36 S. W. Rep. 73, 25 Ins. L. J. 705.

RULE 23.

**Fraud to Apply for Insurance or Policy on Destroyed Property —
Not When Prior Sufficient Oral Contract.**

It is fraud when application is made for insurance or policy upon property which the applicant at the time has reason to believe has been destroyed,¹ but if there is a sufficient oral or parol contract of insurance, and fire occurs subsequently, insured is not bound to notify the company of the destruction of the property on delivery of the policy.²

1. *Hart v. British F. & M. Ins. Co.*, 80 Cal. 440, 22 Pac. Rep. 302; *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. Rep. 191, 23 Ins. L. J. 577. And see *Wales v. New York Bowery Ins. Co.*, 37 Minn. 106, 33 N. W. Rep. 322; *Henshaw v. Insurance Co. of State of New York*, 36 Misc. 405, 73 N. Y. Supp. 1; *Union Ins. Co. v. American Ins. Co.*, 107 Cal. 327, 40 Pac. Rep. 431, 24 Ins. L. J. 785, 28 L. R. A. 692.

2. *Worth v. German Ins. Co.*, 64 Mo. App. 583.

CHAPTER FIFTH.

The Options of the Insurance Company.

- TITLE 1.** To take property at ascertained or appraised value.
2. To repair, rebuild, or replace.

TITLE 1.

Option to Take Property at Ascertained or Appraised Value.

- RULE 1.** Option to take at ascertained or appraised value as imposed by contract.
2. Right valid and enforceable.
3. The option as affected by time.
4. Effect of disposition of damaged goods by insured — Notice.
5. When company not prejudiced.
6. Effect of exercise of option as waiver.
7. Effect of repudiation of an award by appraisers.

RULE 1.

Option to Take at Ascertained or Appraised Value as Imposed by Contract.

The insurance company has the option to take all or any part of the articles at the ascertained or appraised value, on giving notice, within thirty days after the receipt of the proof required, of its intention so to do.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

The standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

does not contain such provision.

The South Dakota form provides: "It shall be optional with the company to take all or any part of the articles of personal property injured or damaged at the actual or appraised sound value thereof without deduction for damage."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Right Valid and Enforceable.

The right of the insurance company to take any part of the property at its ascertained or appraised value as reserved in the policy is valid and enforceable.

Hamilton v. Liverpool, L. & G. Ins. Co., 136 U. S. 242; *Hamilton v. Home Ins. Co.*, 137 U. S. 370.

RULE 3.

The Option as Affected by Time.

The period of thirty days prescribed for exercise of the option reserved commences to run from the time of an amended and completed statement or proof of loss, and not necessarily from the time such a paper is originally furnished, which is defective in material substance.

Kelly v. Sun Fire Office, 141 Pa. St. 10; *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398. And see *Putze v. Saginaw Valley Ins. Co.*, 132 Mich. 670, 94 N. W. Rep. 191, revg. on rehearing previous opinion, 86 N. W. Rep. 814. And see "Payment of the Loss," Rules 3 and 4.

RULE 4.

Effect of Disposition of Damaged Goods by Insured — Notice.

While the fact that the assured sells the saved or damaged goods or property, before the expiration of

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the thirty days reserved for exercise of the option by the company to take them, does not affect the right of the company to demand compliance with the condition; still, where the assured has given notice of such sale, assured is not in fault for selling where the company has not taken steps at any time to show that it wished to avail itself of the option.

Davis v. Grand Rapids Ins. Co., 15 Misc. 263, 36 N. Y. Supp. 792, *affd.* without opinion, 157 N. Y. 685. And see *Chainless Cycle Co. v. Security Ins. Co.*, 52 App. Div. 104, 64 N. Y. Supp. 1060, *affd.*, 169 N. Y. 304, 62 N. E. Rep. 392; *Swearinger v. Pacific Ins. Co.*, 66 Mo. App. 90. And see "Appraisal," Rule 15.

RULE 5.

When Company not Prejudiced.

The insurance company cannot claim that it has been deprived of its right to take damaged or saved goods at their appraised value, when only a fraction of such goods has been disposed of by the assured with the implied consent of the company, and a full description of the articles disposed of has been preserved, and enough remains to satisfy the particular company's claim.

Palatine Ins. Co. v. Morton-Scott Co., 106 Tenn. 558, 61 S. W. Rep. 787; *North German Ins. Co. v. Morton-Scott Co.*, 108 Tenn. 384, 67 S. W. Rep. 816.

RULE 6.

Effect of Exercise of Option as Waiver.

After the insurance company exercises its option by taking and selling the damaged property and learns then for the first time of a fact voiding the insurance

under another condition of the policy, the abandonment of the adjustment without taking steps to rescind the sale, or to provide for payment of the purchase price to the assured, or without doing any act to restore to him what was taken from him under the policy, will not prevent a waiver of the forfeiture;¹ the authority of an adjuster may be presumed.²

1. *First Nat. Bank v. Manchester Assur. Co.*, 64 Minn. 96, 66 N. W. Rep. 136, 25 Ins. L. J. 272.

2. *First Nat. Bank v. Lancashire Ins. Co.*, 65 Minn. 462, 68 N. W. Rep. 1.

RULE 7.

Effect of Repudiation of an Award by Appraisers.

Repudiation by the company of an award of appraisers operates as a waiver of the option to take at appraised value.

Model Dry Goods Co. v. North B. & M. Ins. Co., 79 Mo. App. 550.

TITLE II.

Option to Repair, Rebuild, or Replace.

- RULE 1.** Option to repair, rebuild, or replace as imposed by contract.
2. Right of insured to repair.
 3. Effect of removal or disposition of property by insured — Notice.
 4. Assignment subject to right of company.
 5. Power of adjuster.
 6. Option as affected by time.
 7. Must be in limited time.
 8. No money demand until after expiration of time.
 9. Effect of exercise of option — Building contract.
 10. When more than one company upon loss.
 11. Mere notice does not change contract.
 12. Effect of exercise of option on mortgagee to whom loss payable.

RULE 13. Rents as element of damage.

14. Effect of refusal by insured to permit repairs or rebuilding.
15. Repairing or rebuilding in compliance with city ordinances.
16. Expense less than amount of insurance.
17. Court of equity will not interfere — Remedy at law.
18. Exercise of option does not depend upon written evidence.
19. Effect of statute fixing amount of loss.
20. Exercise of option as waiver.
21. Waiver of appraisal.
22. Effect of appraisal agreement.
23. Waiver by appraisal.

RULE 1.

Option to Repair, Rebuild, or Replace as Imposed by Contract.

The insurance company has the option to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice within thirty days after the receipt of proof of loss required of its intention to do so; but there can be no abandonment by the assured.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in:

Maine,
Massachusetts,

Minnesota,

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

provides that "within sixty days after the insured shall have submitted the statement required, the company shall either pay the amount for which liable, or replace the property with other of the same kind and goodness,—or it may, within fifteen days after such statement, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by the policy and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition; there can be no abandonment."

The standard form of policy prescribed in

New Hampshire

provides same as preceding, except that ten days' notice of intention must be given after submission of statement, and also as follows: "If the company decides to rebuild or repair the property destroyed or injured, it shall begin to do so within twenty days after adjusting the loss, and shall prosecute the work with reasonable diligence until it is completed.

If the company neglects to adjust the loss within fifteen days after receiving notice of it, or to begin to rebuild or repair the property destroyed or damaged within twenty days after the adjustment of the loss, the insured may proceed to rebuild or repair at the expense of the company who shall be liable for the reasonable expenses incurred in so doing and for the loss sustained by its neglect, not exceeding the amount insured; or the insured may commence an action upon the policy.

The South Dakota form provides: "The Company within sixty days after the insured shall have submitted the statement as hereinbefore provided shall either pay * * *, or shall replace the property with other of the same kind and quality (except in case of total loss of buildings where amount of loss is fixed) or it may within fifteen days after such statement is submitted notify the insured of its intention to repair the premises or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

The condition is inoperative in Missouri by statute. *Branigan v. Jefferson Ins. Co.*, 102 Mo. App. 70, 76 S. W. Rep. 643. See "Statutory Provisions."

RULE 2.

Right of Insured to Repair.

The assured is not precluded from making necessary repairs during the prescribed period for exercise of the option by the insurance company, when done in good faith and to prevent further damage;¹ but he should not do so in willful disregard of company's known intention to repair or rebuild;² and where he desires to act, should give reasonable notice to the insurance company.³

1. *Eliot Savings Bank v. Commercial Union Assur. Co.*, 142 Mass. 145.

2. *Beals v. Home Ins. Co.*, 36 Barb. 614, *affd.*, 36 N. Y. 522.

3. *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, *affd.* without opinion, 157 N. Y. 685.

RULE 3.

Effect of Removal or Disposition of Property by Insured — Notice.

While the assured cannot be enjoined from removing or disposing of his property during the period of time reserved by the company for exercise of its option, his doing so may be evidence of bad faith or fraud in his statement or claim for loss;¹ but when the assured gives notice of disposition or sale and the company does not indicate any objection or wish to avail itself of the option, assured is not in fault.² Insured cannot dispose of damaged property in face of an objection or protest of the insurance company.³

1. *New York Ins. Co. v. Delevan*, 8 Paige, 419. And see *Beals v. Home Ins. Co.*, 36 N. Y. 522.

2. *Davis v. Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, *affd.* without opinion, 157 N. Y. 685.

3. *Astrich v. German-American Ins. Co.*, 131 Fed. Rep. 13, C. C. A. , *affg.* 128 Fed. Rep. 477.

RULE 4.

Assignment Subject to Right of Company.

Assignment of claim under the policy after a loss is taken subject to right of company to replace or rebuild.

Tolman v. Manufacturers' Ins. Co., 1 Cush. (Mass.) 73.

RULE 5.**Power of Adjuster.**

An adjuster authorized to settle an alleged loss has the power to determine its amount, and how, when, and where it shall be paid, and hence he necessarily has the authority to determine whether it shall be paid in money or by the reconstruction of the damaged building, and the power to exercise the option of the company for that purpose.

Lancashire Ins. Co. v. Barnard, 111 Fed. Rep. 702, 49 C. C. A. 559.

RULE 6.**Option as Affected by Time.**

The company's right of election to rebuild expires thirty days after service of the statement or proof of loss; the time does not run from the ascertainment of the loss by an appraisal. Where the company claims such right after the expiration of the thirty days, and actually rebuilds, the assured is not estopped by his mere silence, without some affirmative act calculated to mislead the company, from insisting upon money payment for the loss,¹ but where it is necessary to amend or complete the statement or proof of loss, which is defective in substance as first furnished, the time commences to run from the service of the amended and completed statement.² Must be exercised within sixty days from the date of a waiver of proof of loss.³

1. *McAllaster v. Niagara Ins. Co.*, 156 N. Y. 80, 50 N. E. Rep. 502, affg. 84 Hun, 322, 32 N. Y. Supp. 353; *Maryland Home Ins. Co. v. Kimmel*, 89 Md. 437, 43 Atl. Rep. 764, 28 Ins. L. J. 729. And see *Insurance Co. of N. A. v. Hope*, 58 Ill. 75.

2. *Kelly v. Sun Fire Office*, 141 Pa. St. 10, 21 Atl. Rep. 447; *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398.

3. *Farmers & Merchants' Ins. Co. v. Warner*, Nebr. , 98 N. W. Rep. 48.

RULE 7.

Must be in Limited Time.

The option to replace or rebuild may be exercised at any time after the loss, and before the expiration of the time limited in the policy.

Lancashire Ins. Co. v. Barnard, 111 Fed. Rep. 702, 49 C. C. A. 559. And see *Insurance Co. of N. A. v. Hope*, 58 Ill. 75.

RULE 8.

No Money Demand Until After Expiration of Time.

Claim does not ripen into a money demand until after expiration of period prescribed for exercising option.

Westchester Ins. Co. v. Dodge, 44 Mich. 420.

RULE 9.

Effect of Exercise of Option — Building Contract.

The exercise by the insurance company of its option to repair or rebuild converts the insurance contract into a building contract, which can only be discharged by performance. Defects in the original building will not excuse performance;¹ payment in money can no longer be required;² for a breach of the building contract the measure of damage is the cost of repairing or rebuilding, where there has been a total failure, or the difference between the work as done and its value if done, or the amount necessary to complete the building, according to the standard of that existing before the fire;³ and the insurance company may be liable for damages caused through the negligence of those employed by it

to do the work or for defective work,⁴ or for damages caused by delay.⁵

1. *Henderson v. Crescent Ins. Co.*, 48 La. Ann. 1176, 20 So. Rep. 658.

2. *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. Rep. 187, 27 Ins. L. J. 156; *Morrell v. Irving Ins. Co.*, 33 N. Y. 420; *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Heilman v. Westchester Ins. Co.*, 75 N. Y. 7; *Wynkoop v. Niagara Ins. Co.*, 91 N. Y. 478; *American Central Ins. Co. v. McLanathan*, 11 Kans. 533; *Brinley v. National Ins. Co.*, 11 Metc. (Mass.) 195; *Fire Assoc. v. Rosenthal*, 108 Pa. St. 474, 1 Atl. Rep. 303; *Henderson v. Crescent Ins. Co.*, 48 La. Ann. 1176, 20 So. Rep. 658.

3. *Hartford Ins. Co. v. Peebles Hotel Co.*, 82 Fed. Rep. 546, 27 C. C. A. 223. And see *St. Paul Ins. Co. v. Johnson*, 77 Ill. 598; *Morrell v. Irving Ins. Co.*, 33 N. Y. 429, and preceding cases.

4. *Henderson v. Sun Mutual Ins. Co.*, 48 La. Ann. 1031, 20 So. Rep. 164; *Ryder v. Commonwealth Ins. Co.*, 52 Barb. 447.

5. *American Central Ins. Co. v. McLanathan*, 11 Kans. 533; *Fire Assoc. v. Rosenthal*, 108 Pa. St. 474, 1 Atl. Rep. 303; *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598; *Home Ins. Co. v. Garfield*, 60 Ill. 124.

In *Home Ins. Co. v. Garfield*, 60 Ill. 124, where the court said that the notice of intention to rebuild did not change the insurance contract to a building contract, the construction was based upon special language of a mutual company. *Id.* 128.

RULE 10.

When More than One Company upon Loss.

When there are a number of companies upon a loss, and they jointly in one notice exercise the option, the assured may regard it as either a joint or several building contract, unless there are words of severance in the notice, upon which all the companies may be held jointly or severally liable. They cannot set up a misjoinder as a defense, nor invoke the apportionment clause in their policies in limitation of such liability.

If one company is compelled to pay the whole damage as and for breach of the building contract its remedy is by contribution from the others.

Hartford Ins. Co. v. Peebles Hotel Co., 82 Fed. Rep. 546, 27 C. C. A. 223; *Morrell v. Irving Ins. Co.*, 33 N. Y. 429. But see *Good v. Buckeye Ins. Co.*, 43 Ohio St. 394, where it was held that the apportionment clause in the policy did limit the liability.

RULE 11.

Mere Notice Does not Change Contract.

A mere notice of an election to rebuild does not merge, convert, or affect the contract for indemnity by money payment contained in the policy. Such notice secures to the company the privilege of discharging its obligation by rebuilding; but if the company, for any reason, or for no reason, does not in fact perform in repairing or rebuilding, then the assured is entitled to demand and enforce payment of the sum due on the policy.

Langan v. Aetna Ins. Co., 99 Fed. Rep. 374, affd. on opinion below, 108 Fed. Rep. 985, 48 C. C. A. 174. See Rule 9.

RULE 12.

Effect of Exercise of Option on Mortgagee to Whom Loss Payable.

When company has exercised its option to rebuild and the contract becomes one for rebuilding, the legal title to a cause of action thereon is vested in the assured, and not in a mortgagee to whom the loss was made payable.

Heilman v. Westchester Ins. Co., 75 N. Y. 7. And see *Stamps v. Commercial Ins. Co.*, 77 N. C. 209.

RULE 13.**Rents as Element of Damage.**

Rents are not an element of damage unless the company has unreasonably delayed the work.

Home Ins. Co. v. Garfield, 60 Ill. 125; *St. Paul Ins. Co. v. Johnson*, 77 Ill. 598. And see cases cited under Rule 9 (5).

RULE 14.**Effect of Refusal by Insured to Permit Repairs or Rebuilding.**

Where the insurance company has exercised its option by proper notice, a refusal by the assured to permit the repairs or rebuilding operates to discharge the company.

Beals v. Home Ins. Co., 36 N. Y. 522.

RULE 15.**Repairing or Rebuilding in Compliance with City Ordinances.**

The election to repair or rebuild obliges the insurance company to do so in compliance with city ordinances; if the company fails to do so assured may recover, as damages for breach of the building contract, the cost of repairing or rebuilding as required.

Fire Assoc. v. Rosenthal, 108 Pa. St. 474. And see *Brown v. Royal Ins. Co.*, 1 Ell. & Ell. (Eng.) 853; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563; *Hamburg-Bremen Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. Rep. 337; *Hewins v. London Assur. Co.*, 184 Mass. 177, 68 N. E. Rep. 62.

See also "Amount of Loss or Damage" and "Exemptions, Exceptions and Limitations."

RULE 16.

Expense Less than Amount of Insurance.

If the expense of repairing or rebuilding is less than the amount of the insurance, the balance of the insurance continues in force during the term of the policy.

Trull v. Roxbury Ins. Co., 3 Cush. (Mass.) 263.

RULE 17.

Court of Equity Will not Interfere — Remedy at Law.

A court of equity will not interfere by injunction with the insured or an insurance company which has exercised its option to repair or rebuild; the assured must seek his remedy at law.

New York Fire Ins. Co. v. Delevan, 8 Paige, 419; *Home Ins. Co. v. Thompson*, 1 U. C. (Err. & App.) 247.

RULE 18.

Exercise of Option Does not Depend upon Written Evidence.

The exercise of company's option to rebuild does not necessarily depend upon written evidence; it may be established by parol evidence;¹ but for obvious reasons it is always advisable to make such election in writing, in plain terms, as it should not depend upon uncertain evidence;² and the notice must be unconditional.³

1. *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. Rep. 187, 27 Ins. L. J. 156; *Fire Assoc. v. Rosenthal*, 108 Pa. St. 474. And see *Morrell v. Irving Ins. Co.*, 33 N. Y. 429.

2. *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98.

3. *Rieger v. Mechanics' Ins. Co.*, 69 Mo. App. 674.

RULE 19.**Effect of Statute Fixing Amount of Loss.**

Under a standard form of policy prescribed by statute containing a clause giving an insurance company the option to rebuild, such option may be exercised and is legally effective, notwithstanding another statute makes the amount of the insurance written conclusive as to the amount or measure of damage in the event of a total loss;¹ otherwise, a statute fixing the measure of damage and amount to be paid by an insurance company in event of a total loss renders the option in an insurance policy inoperative.²

1. *Temple v. Niagara Ins. Co.*, 109 Wis. 372, 85 N. W. Rep. 361.

2. *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. Rep. 992; *Marshal v. American Ins. Co.*, 80 Mo. App. 18. And see *O'Keefe v. Liverpool, L. & G. Ins. Co.*, 140 Mo. 558, 41 S. W. Rep. 922, 26 Ins. L. J. 888, 39 L. R. A. 819; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 62 N. E. Rep. 338, 56 L. R. A. 159.

RULE 20.**Exercise of Option as Waiver.**

Exercise of option to repair or rebuild operates as a waiver of all known violations of conditions of the policy otherwise making it void.

Bersche v. Globe Ins. Co., 31 Mo. 546; *American Central Ins. Co. v. McLanathan*, 11 Kans. 533.

RULE 21.**Waiver of Appraisal.**

Exercise of option to replace or rebuild waives an appraisal;¹ but if the appraisal is had it does not neces-

sarily waive assured's claim for damages for failure to rebuild.²

1. *Wynkoop v. Niagara Ins. Co.*, 91 N. Y. 478.
2. *Good v. Buckeye Ins. Co.*, 43 Ohio St. 394.

RULE 22.

Effect of Appraisal Agreement.

While a waiver of right to rebuild or replace may be guarded against by express agreement in the submission to appraisal, that does not prevent a previous waiver by adjuster in refusing to rebuild and statement of intention to pay when amount fixed by appraisal.

Platt v. Aetna Ins. Co., 153 Ill. 113, 38 N. E. Rep. 580. See Rule 23. See also "Appraisal."

RULE 23.

Waiver by Appraisal.

An appraisal or demand for it does not necessarily of itself waive right to repair, replace, or rebuild;¹ but may be evidence of such waiver when the policy does not in terms provide that there shall be no waiver by appraisal,² or where the right is claimed after the prescribed time,³ or where the company or its representative said it would pay the amount as found or determined by the appraisal.⁴

1. *Aetna Ins. Co. v. Platt*, 40 Ill. App. 191; *Platt v. Aetna Ins. Co.*, 153 Ill. 113, 38 N. E. Rep. 580, 24 Ins. L. J. 132, 26 L. R. A. 853; *Langan v. Aetna Ins. Co.*, 96 Fed. Rep. 706, 99 Fed. Rep. 374, *affd.* on opinion below, 108 Fed. Rep. 985, 48 C. C. A. 174.

2. *Elliott v. Merchants' Ins. Co.*, 109 Iowa, 39, 79 N. W. Rep. 452. And see *Alliance Co-operative Ins. Co. v. Arnold*, 65 Kana. 163, 69 Pac. Rep. 174. See also "Appraisal."

3. See Rule 6.

4. *Platt v. Aetna Ins. Co.*, 153 Ill. 113, 38 N. E. Rep. 580, 24 Ins. L. J. 132, 26 L. R. A. 853.

CHAPTER SIXTH.**Apportionment of the Loss.**

- RULE** 1. Apportionment of the loss as imposed by contract.
2. Apportionment not governed by rules of contribution — Construction.
3. Duty of insured to disclose other insurance.
4. Liability of each company severally limited — No contribution as between the companies.
5. Liability of each company determined by terms of its own contract.
6. When loss equals or exceeds insurance.
7. Other policies must be effected by insured or by his authority or consent.
8. Admission of parol evidence to modify effect or application of other insurance.
9. When insurance made binding by agent of four companies.
10. Insured not obliged to maintain insurance unless he has agreed to do so.
11. Void or invalid insurance must be included.
12. Other insurance must cover same subject.
13. When other policy covers other property.
14. Limitation on preceding rule — How difficulty removed.
15. How whole insurance is determined when other policy also covers other property.
16. Other insurance must cover same interest and risk — Test.
17. When policy covers other interests besides that of insured — Effect of specific insurance.
18. Effect of mortgagee clause — Rights of mortgagee.
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20. When all the policies insure interest of different mortgagees.
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 - 26. Effect of fractional insurance on amount of loss.
 - 27. Effect of limitation as to amount upon specific subjects.
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 - 29. Apportionment not construed to relieve companies from liability — Modification or limitation by special clauses.
 - 30. Loss must be made good, except when insured has agreed to stand part of it.
 - 31. Effect of excepting property specifically insured.
 - 32. General and specific policies — Construction and application by the court — Liability of specific policy.
 - 33. Same subject — How whole insurance determined — Insurance itemized.
 - 34. Same subject — Insurance itemized.
 - 35. Construction of “described property” and “covering such property” — Blanket policy.
 - 36. Apportionment under Lloyds policy.
 - 37. Effect of statute fixing amount of loss — Coinsurance.
 - 38. Old rules rejected by court when in conflict with contract.
 - 39. Apportionment must be pleaded as a defense.

RULE 1.

Apportionment of the Loss as Imposed by Contract.

The insurance company is not liable for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under the policy, or of the contribution to be made by the company, in case of loss, may be provided for by agree-

ment or condition written on the policy or attached or appended thereto.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in:

Maine,

Massachusetts,

provides that "if there shall be any other insurance on the property insured whether prior or subsequent, the insured shall recover no greater proportion of the loss sustained than the sum insured bears to the whole amount insured thereon.

In Minnesota and South Dakota, by the standard form prescribed, the provision is same as preceding, except there is inserted the clause "except in case of total loss on buildings."

In New Hampshire, by the standard form prescribed, the provision is same as in Maine and Massachusetts, except the words are inserted "valid or invalid."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

RULE 2.

Apportionment not Governed by Rules of Contribution—Construction.

The clause, now usual in policies of insurance, which provides for an apportionment of the loss is a part of the contract, and must receive a reasonable construction. The courts have no right to engraft upon it the rules governing suits for contribution among insurers,

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

nor to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself and construe it as they would any other stipulation between the insurer and the insured.

Ogden v. East River Ins. Co., 50 N. Y. 388, 390.

RULE 3.

Duty of Insured to Disclose Other Insurance.

It is the duty of insured to disclose all other insurance bearing on the question of apportionment of the loss; he cannot have or retain any advantage of a settlement made in disregard of such other insurance; it operates as a fraud on the settling company.

Teutonia Ins. Co. v. Bissell (Tenn.), 48 S. W. Rep. 703, *affd.* orally by Supreme Court, 48 S. W. Rep. 706. And see *Fitzsimmons v. City Ins. Co.*, 18 Wis. 234.

RULE 4.

Liability of Each Company Severally Limited — No Contribution as Between the Companies.

By the apportionment clause in the policy each company binds itself to pay only its proper proportion of the loss, without reference to what is paid by the others; if it pays more than its proportion, there can be no contribution as between the insurance companies, nor can one company escape liability for its proportion on the plea that the insured has been indemnified in the amount he has received from the other companies.

Hanover Ins. Co. v. Brown, 77 Md. 64, 25 Atl. Rep. 989, rehearing denied, 77 Md. 76, 27 Atl. Rep. 314; *Goodwin v. Merchants' Ins. Co.*, 118 Iowa, 601, 92 N. W. Rep. 894; *Fitzsimmons v. City Ins. Co.*, 18 Wis. 234; *Bardwell v. Conway Ins. Co.*, 118 Mass. 465; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578.

And see *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635; *Case v. Manufacturers' Ins. Co.*, 82 Cal. 265, 21 Pac. Rep. 843; *Good v. Buckeye Ins. Co.*, 43 Ohio St. 394, 2 N. E. Rep. 420; *Home Ins. Co. v. Koob*, 68 S. W. Rep. 453, 24 Ky. L. Rep. 223; *Rickerson v. German-American Ins. Co.*, 6 App. Div. 550; *Cassity v. New Orleans Ins. Assoc.*, 65 Miss. 49; *Liverpool, L. & G. Ins. Co. v. Verdier*, 35 Mich. 395; *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14.

In Georgia the rule appears to be otherwise, and that right of *contribution* exists as between the companies. *Williamsburg Ins. Co. v. Gwinn*, 88 Ga. 65, 13 S. E. Rep. 837, citing 1 May Ins., § 13. But this section of the text in May, in reference to the cases cited, upon examination, evidently refers to policies which do not contain the usual *apportionment* clause or condition. May says in the section cited that assured has the *option* of collecting his *entire* loss from any one of the companies, or in proportion from each. This cannot possibly be true when all the policies limit their liability by the apportionment clause.

RULE 5.

Liability of Each Company Determined by Terms of Its Own Contract.

The liability of each company is determined by the terms of its own contract, and is not modified by anything in the contract of another company which may enable the insured to claim or recover for a larger valuation or amount of loss.

American Central Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235, citing *Bardwell v. Insurance Co.*, 118 Mass. 465. And see *Kansas City Paper Box Co. v. American Ins. Co. (Mo. App.)*, 75 S. W. Rep. 186.

RULE 6.

When Loss Equals or Exceeds Insurance.

Whenever the amount of the loss equals or exceeds the amount of the insurance upon the same property, the question of apportionment does not arise.

Lesure Lumber Co. v. Mutual Ins. Co., 101 Iowa, 514, 70 N. W. Rep. 761; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W.

Rep. 261; *Ogden v. East River Ins. Co.*, 50 N. Y. 388; *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28; *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. Rep. 1031; *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235.

RULE 7.

Other Policies Must be Effected by Insured or by His Authority or Consent.

Other policies must have been effected by assured or by his authority or consent; does not include policies attempted to be thrust upon assured by officious persons without his knowledge, authority, or consent, and which he repudiates.

London & Lancashire Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. Rep. 542.

RULE 8.

Admission of Parol Evidence to Modify Effect or Application of Other Insurance.

A policy claimed to be other insurance requiring apportionment may be shown by parol evidence not to apply to the same property or interest.

Lowell Mfg. Co. v. Safeguard Ins. Co., 88 N. Y. 591; *Richardson v. Home Ins. Co.*, 15 Jones & Sp. 138; *Storer v. Elliot Ins. Co.*, 45 Me. 175; *Haley v. Dorchester Ins. Co.*, 1 Allen (Mass.), 536; *Westchester Ins. Co. v. Storms*, 6 Tex. Civ. App. 390, 25 S. W. Rep. 318.

RULE 9.

When Insurance Made Binding by Agent of Four Companies.

Where insurance is made binding by agent of four named companies, and loss occurs, it is not a joint contract, but a separate contract by each, subject to the apportionment clause.

Fitton v. Phoenix Ins. Co., 25 Fed. Rep. 880.

RULE 10.

Insured not Obligated to Maintain Insurance Unless He has Agreed to do So.

The assured is under no obligation to keep up or maintain insurance for the purpose of relieving an insurance company under the apportionment clause;¹ unless he has otherwise agreed by acceptance of a policy containing a clause or condition requiring him to do so.²

1. *Indiana Ins. Co. v. Hoffman*, 128 Ind. 250, 27 N. E. Rep. 561; *Hoffman v. Minneapolis Ins. Co.*, 42 Minn. 291, 44 N. W. Rep. 67; *Hoffman v. Insurance Cos.*, 88 Tenn. 735; *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Agricultural Ins. Co. v. Bermiller*, 70 Md. 400, 17 Atl. Rep. 380; *Hoffman v. Manufacturers' Ins. Co.*, 38 Fed. Rep. 487.

2. *Cheseborough v. Home Ins. Co.*, 61 Mich. 333, 28 N. W. Rep. 110. And see *Farmers' Feed Co. v. Scottish Union & Nat. Ins. Co.*, 173 N. Y. 241, 65 N. E. Rep. 1105.

In *Hand v. Williamsburg City Ins. Co.*, 57 N. Y. 41, it was held that the assured might voluntarily concede to another company that its policy was void or invalid, and thus throw the whole loss on one company. But this effect would seem now to be prevented by the language of the standard form in terms including valid or *invalid* insurance. See Rules 1 and 11.

RULE 11.

Void or Invalid Insurance Must be Included.

Void or invalid insurance must be included in determining the amount of the whole insurance as the basis of apportionment;¹ unless otherwise provided by statute.²

1. *Bateman v. Lumbermen's Ins. Co.*, 189 Pa. St. 465, 42 Atl. Rep. 184, 28 Ins. L. J. 159; *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. Rep. 655, 27 Ins. L. J. 575; *Rickerson v. German-American Ins. Co.*, 6 App. Div. 550; *Lyons v. Smith*, 36 App. Div. 627, 55 N. Y. Supp. 148; *London & L. Ins. Co. v. Turnbull*, 86 Ky. 230, 5 S. W. Rep. 542; overruling in effect *Galantschik v. Globe Ins. Co.*, 10 Misc. 369, 31 N. Y. Supp. 32.

And see *Liverpool, L. & G. Ins. Co. v. Verdier*, 35 Mich. 395; *Cassity v. New Orleans Ins. Assoc.*, 65 Miss. 49, 3 So. Rep. 138; *Parks v. Hartford Ins. Co.*, 100 Mo. 373.

2. *Gurnett v. Atlas Mutual Ins. Co.*, Iowa, , 100 N. W. Rep. 542. See "Statutory Provisions," Iowa.

RULE 12.

Other Insurance Must Cover Same Subject.

Insurance requiring apportionment must cover the same subject-matter;¹ but not necessarily the whole of it.²

1. *United Underwriters' Ins. Co. v. Powell*, 94 Ga. 359, 21 S. E. Rep. 565.

2. See Rule 13.

RULE 13.

When Other Policy Covers Other Property.

The fact that a policy of insurance covers property not covered by another policy as well as that covered thereby does not deprive it of the character of other insurance within the clause or condition as to apportionment of the loss.¹ A permission for other concurrent insurance does not require the other insurance to cover the whole property.²

1. *Corkery v. Security Ins. Co.*, 99 Iowa, 382, 68 N. W. Rep. 792, 26 Ins. L. J. 331; *Ogden v. East River Ins. Co.*, 50 N. Y. 388; *Blake v. Exchange Ins. Co.*, 12 Gray (Mass.), 265. And see *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126; *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781, rejecting and explaining Pennsylvania cases and rule. See Rule 14.

2. *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235. And see volume 2, "Other Insurance."

RULE 14.

Limitation on Preceding Rule — How Difficulty Removed.

But Rule 13 does not mean that the whole amount of such other policy, covering or describing additional or other subjects, shall be added to make up the total insurance on the balance. If there is no specific sum made applicable to the additional subject in the other

policy, so it can be deducted to arrive at the total amount of insurance, then there can be no case of double insurance calling for apportionment, because it is impossible to ascertain the basis of it, that is the amount of the total insurance upon the same subject;¹ the difficulty created by this rule is removed by deducting the amount or value of the loss to the additional or other subjects from the amount of the policy, and the balance of its amount or insurance, if any, then applicable to the same subject is added to make the total insurance the basis of apportionment.²

1. *West Branch Lumbermen's Exchange v. American Central Ins. Co.*, 183 Pa. St. 366; *Clarke v. Western Assur. Co.*, 146 Pa. St. 561, 23 Atl. Rep. 248; *Meigs v. Insurance Co. of N. A.*, 205 Pa. St. 378, 54 Atl. Rep. 1053.

2. Rule 15. And see *Schmaelzle v. London & Lancashire Ins. Co.*, 75 Conn. 397, 53 Atl. Rep. 863; *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235, citing *Cromie v. Insurance Co.*, 15 B. Mon. (Ky.) 432; *Angelrodt v. Insurance Co.*, 31 Mo. 593; *Insurance Co. v. Roedel*, 78 Pa. St. 19.

RULE 15.

How Whole Insurance is Determined When Other Policy also Covers Other Property.

Where one policy covers property under general description, and another policy covers same property, and also in addition other property not covered by the former, the value or amount of loss to property thus additionally covered by the latter policy should be deducted from it, to determine the whole amount of insurance on the balance covered by both policies, as basis of apportionment; if the loss on such balance of the subject exceeds the whole amount of insurance, af-

ter such deduction the first policy is liable for its full amount.

Angelrodt v. Delaware Ins. Co., 31 Mo. 593. And see *Haley v. Dorchester Ins. Co.*, 1 Allen (Mass.), 536; *Barnes v. Hartford Ins. Co.*, 9 Fed. Rep. 813; *Mayer v. American Ins. Co.*, 2 N. Y. Supp. 227; *Cromie v. Kentucky Ins. Co.*, 15 B. Mon. (Ky.) 432; *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235, citing *Cromie v. Insurance Co.*, 15 B. Mon. (Ky.) 432; *Angelrodt v. Insurance Co.*, 31 Mo. 593; *Insurance Co. v. Roedel*, 78 Pa. St. 19.

Above is in substance what has been known as the "Cromie" rule. And see Rule 14.

This rule may not apply when the other policy is *itemized as to the amount of insurance* on the *several items*. See Rules 32-35, and notes to Rules 23, 38 and 39.

In the *Cromie* case, which is the foundation of the "Cromie rule," one policy covered \$5,000 on a certain building, and the others \$7,000 on the *same* building, and *also another building*, but it does not appear that the insurance was *itemized* as to the *amount of insurance* on *each building*. There was a loss on both buildings, about \$8,000 on the former and \$1,100 on the other or additional building. The court said, "the amount of this loss (\$1,100) should be deducted from their policies before their aggregate amount is brought into the calculation, by which the proportional liability of each is to be ascertained." This expression is the foundation of the rule and practice of considering the *amount* of the *loss* in determining the amount of *insurance* in any case, and would appear to have had its origin in the *necessity* of doing so, as there was no other means of ascertaining the amount of insurance on the *same subject*. See Rules 13 and 14.

RULE 16.

Other Insurance Must Cover Same Interest and Risk — Test.

Insurance requiring apportionment must cover the same interest and risk,¹ but this does not necessarily mean a description of the same interest in the *same terms*; for instance, where a railroad company has one policy insuring it to extent of its liability as a carrier or warehouseman, and has another policy on same

property payable to itself as trustee for benefit of the shippers, the latter insurance should be included in apportioning the loss;² if assured cannot resort to any particular policy for indemnity, such policy cannot be taken into consideration in apportionment;³ but this is subject to Rule 11.⁴

1. *Niagara Ins. Co. v. Scammon*, 144 Ill. 490, 32 N. E. Rep. 914, 22 Ins. L. J. 157; *Traders' Ins. Co. v. Pacaud*, 51 Ill. App. 252, *affd.*, 150 Ill. 245, 37 N. E. Rep. 460, 23 Ins. L. J. 624; *Cannon v. Home Ins. Co.*, 49 La. Ann. 1367, 22 So. Rep. 387, 26 Ins. L. J. 737; *Lowell Mfg. Co. v. Safeguard Ins. Co.*, 88 N. Y. 591; *Tyler v. Ætna Ins. Co.*, 12 Wend. 507, 515; *Deming v. Merchants' Cotton Co.*, 90 Tenn. 306, 347, 17 S. W. Rep. 89.

2. *Minneapolis, St. P. & M. R. R. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. Rep. 132, 25 Ins. L. J. 252; *Home Ins. Co. v. Minneapolis, St. P. & M. R. R. Co.*, 71 Minn. 296, 74 N. W. Rep. 140.

3. *Lowell Mfg. Co. v. Safeguard Ins. Co.*, 88 N. Y. 591. And see *Home Ins. Co. v. Gwathmey*, 82 Va. 923; *Fox v. Phoenix Ins. Co.*, 52 Me. 333.

4. See Rule 11.

It was *held* in *North British & M. Ins. Co. v. Liverpool, L. & G. Ins. Co., L. R.*, 5 Ch. Div. 569, that there was no contribution between policies insuring goods held "in trust," and another insuring owner's interest. But it should be noted that this was an action between the *companies* themselves, and did not involve any question as between the *assured* and the company, under the operation of an apportionment clause or condition. The effect of the insertion of the *apportionment* clause in policies in the United States has taken away the right of *contribution* as between the companies. See Rule 4.

RULE 17.

**When Policy Covers Other Interests Besides that of Insured —
Effect of Specific Insurance.**

Where policy is taken out in name of certain assured, but covers not only his interest but that of others for whom he acts as agent under such general terms as

“ held by him in trust or on commission,” “ whom it may concern,” “ sold or not delivered,” or other like or similar effective terms, if other policies are taken out by the owners on the same property, all the policies must be taken into consideration in determining the amount of insurance as basis of apportionment;¹ but otherwise as to property which, under the terms of the policy, must be specifically insured to render the company liable.²

1. *Hough v. People's Ins. Co.*, 36 Md. 398; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Robbins v. Firemen's Fund Ins. Co.* (U. S. Cir.), 16 Blatchf. 122; *Lowell Mfg. Co. v. Safeguard Ins. Co.*, 88 N. Y. 591; *Fire Ins. Assoc. v. Merchants' Transportation Co.*, 66 Md. 339. And see *Waring v. Indemnity Co.*, 45 N. Y. 606.

2. *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. Rep. 209. And see Rules 29, 31.

RULE 18.

Effect of Mortgagee Clause — Rights of Mortgagee.

Under the “ mortgagee clause ” and as *against the mortgagee* another policy upon the same property and obtained by the owner and insured without the knowledge or consent of the mortgagee, is not such other insurance as requires an apportionment of the loss. And this applies even when the mortgagee clause contains a special provision that the company should be liable only “ in proportion that the amount insured should bear to the whole amount of insurance on the property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise.” The insurance which shall diminish or impair the right of the mortgagee to recover his loss must be one which has been issued upon

his interest in the property, or when he shall have consented to the other insurance upon the owner's interest.

Eddy v. London Assur. Co., 143 N. Y. 311, 38 N. E. Rep. 307, 24 Ins. L. J. 1; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 44 N. E. Rep. 209, 25 Ins. L. J. 746. And see *City Savings Bank v. Pennsylvania Ins. Co.*, 122 Mass. 165; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439. See also Rule 21.

Exception.— It is held otherwise in *Hartford Ins. Co. v. Williams*, 63 Fed. Rep. 925, 11 C. C. A. 503, 27 U. S. App. 493; *Sun Ins. Office v. Varble*, 103 Ky. 758, 46 S. W. Rep. 486, 27 Ins. L. J. 798.

RULE 19.

Effect of Insurance upon Interest of Mortgagee.

Insurance by a mortgagee upon his interest as such is not other insurance requiring apportionment of the loss on claim by the owner upon a policy obtained by him on his interest;¹ but otherwise where loss is merely made payable to a mortgagee without the mortgagee clause,² unless insurance is obtained by the mortgagee in that form in exclusive protection of his own interest, without privity or authority of the owner.³

1. *Adams v. Greenwich Ins. Co.*, 9 Hun, 45, affd., 70 N. Y. 166. And see *Traders' Ins. Co. v. Pacaud*, 51 Ill. App. 252; *Tuck v. Hartford Ins. Co.*, 56 N. H. 326; *Home Ins. Co. v. Koob*, 113 Ky. 360, 68 S. W. Rep. 453, 24 Ky. L. Rep. 223.

2. *Doran v. Franklin Ins. Co.*, 86 N. Y. 635, 10 Ins. L. J. 842. And see *Tuck v. Insurance Co.*, 56 N. H. 326; *Niagara Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. Rep. 919.

3. *Cannon v. Home Ins. Co.*, 49 La. Ann. 1367, 22 So. Rep. 387, 26 Ins. L. J. 737. And see "Mortgagor and Mortgagee."

RULE 20.

When all the Policies Insure Interest of Different Mortgagees.

Where several policies insure the several interests of different mortgagees as such in the same property,

there can be no apportionment, because they do not insure the same interest.

Fox v. Phoenix Ins. Co., 52 Me. 333.

RULE 21.

As Against Mortgagee with Mortgagee Clause.

Where an insurance company issues two policies, one to the owner, and the other to the owner, with loss payable to a mortgagee, with mortgagee clause attached, as against claim by latter the first policy is not such other insurance as to require apportionment.

Crow v. Greenwich Ins. Co., 66 Hun, 54, 20 N. Y. Supp. 753. And see Rule 18.

RULE 22.

A Coinsurance Clause Must be Considered.

A coinsurance clause in a policy must be taken into consideration in apportioning the loss according to its terms, and other policies which do not contain such a clause cannot take advantage of it in the apportionment,¹ unless they also contain a clause to effect that if any other policy should have the coinsurance clause it should be operative in their case; the assured cannot complain that a coinsurance clause has the effect to reduce the amount which he might otherwise have received.²

1. *Armour Packing Co. v. Reading Ins. Co.*, 67 Mo. App. 215; *Quinn v. Fire Assoc.*, 180 Mass. 560, 62 N. E. Rep. 980; *Fireman's Fund Ins. Co. v. Pekar*, 106 Ga. 10, 31 S. E. Rep. 779; *East Texas Ins. Co. v. Coffee*, 61 Tex. 287; *Chesbrough v. Home Ins. Co.*, 61 Mich. 333, 28 N. W. Rep. 110. And see *Singleton v. Boone Ins. Co.*, 45 Mo. 250; *Post v. Hampshire*

Ins. Co., 12 Metc. (Mass.) 555; *Huckins v. People's Ins. Co.*, 31 N. H. 238; *Kansas City Paper-Box Co. v. American Ins. Co.* (Mo. App.), 75 S. W. Rep. 186.

2. *Catoosa Springs Co. v. Lynch*, 18 Misc. 209, 41 N. Y. Supp. 377. And see *Farmers' Feed Co. v. Scottish Union & Nat. Ins. Co.*, 173 N. Y. 241, 65 N. E. Rep. 1105. And see Rule 23.

RULE 23.

What is Whole Insurance When One Policy Contains Coinsurance Clause and Other Does not.

When one company has issued a policy in a certain amount without the coinsurance clause, and another company its policy in a certain amount with the coinsurance clause, in ascertaining the liability of the former under the apportionment clause, the "whole insurance" as basis of the apportionment is the aggregate face value or amount of both policies, regardless of the cash value of the property, or the effect of the coinsurance clause in the other policy upon the same property. Under such circumstances the amount of insurance effected by the other policy containing the coinsurance clause is not identical with the amount of the loss as determined by operation of the coinsurance clause. If the assured does not recover his entire loss, it is caused by his agreement to stand part of it.

Farmers' Feed Co. v. Scottish Union & Nat. Ins. Co., 173 N. Y. 241, 65 N. E. Rep. 1105, revg. 65 App. Div. 70, 72 N. Y. Supp. 732; *Stephenson v. Agricultural Ins. Co.*, 116 Wis. 277, 93 N. W. Rep. 19.

By a singular coincidence the New York Court of Appeals and the Wisconsin Supreme Court had this question pending before them at the same time, and both courts reached substantially the same conclusion in decision and opinions handed down the same day, January 13, 1903.

These cases are not authority or precedent for a claim that at all times and under all circumstances the term "whole in-

insurance" shall be construed as meaning *only* the *face* amount of *all* the policies on a loss. The term "the amount insured by the policy" is also subject to construction by the courts as applicable to any particular state of facts, and does not always necessarily mean *face* amount. If these terms "whole insurance" and "the amount insured by the policy" always and invariably mean *face* amount, the rule applied to its full extent would defeat apportionment altogether in many cases, and render a company liable for the whole loss, because it would be impossible to ascertain the basis of apportionment, that is, the amount of the whole insurance upon the *same subject*, or it could not be claimed that the *face* amount of all the policies, as constituting the whole insurance, *applied to the same subject*. See Rules 12-15.

Being the latest case upon the special subject, the opinion of the New York Court of Appeals in the Farmers' Feed Company case is here inserted. The court says:

"This controversy was submitted upon an agreed statement of facts, which, so far as material to the appeal, are as follows: In May, 1898, the defendant, by a policy of the standard form, insured certain buildings belonging to the plaintiff in the city of New York against loss by fire for the term of three years from the 23d of May, 1898, 'to an amount not exceeding \$60,000.' On the 14th day of June, 1900, such insurance to the amount of \$17,500 was canceled by the mutual consent, leaving a balance of \$42,500 still in force. The policy contained an apportionment clause which provided that 'this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property. * * *'. On the 5th day of June, 1900, the plaintiff procured other insurance on the same property 'to an amount not exceeding \$5,000' in each of the following companies: The Springfield Fire & Marine Insurance Company, the Providence-Washington Insurance Company, and the Westchester Fire Insurance Company, and 'to an amount not exceeding \$2,500' in the Insurance Company of the State of Pennsylvania, making \$17,500 as the maximum amount for which these four companies could, in any event, become liable. Each of these policies contained a paragraph headed, 'Percentage Coinsurance Clause,' of which the following is a copy: 'In consideration of the premium for which this policy is issued it is expressly stipulated that in the event of loss this com-

pany shall be liable for no greater proportion thereof than the sum hereby insured bears to 80 per cent. of the cash value of the property described herein at the time when such loss shall happen, nor more than the proportion which this policy bears to the total insurance.' On the 1st of July, 1900, a fire occurred, by which the property insured, the cash value of which was \$124,660, was damaged to the amount of \$45,321.18, as ascertained by an appraisal duly had. The plaintiff claims that the amount due from the defendant under its policy 'by reason of the fire loss' was \$38,177.26, while the defendant claims that such amount was but \$32,102.50, which it has paid to the plaintiff under an agreement that such payment should be without prejudice. The Appellate Division rendered judgment in favor of the plaintiff for the difference between these sums, amounting to \$6,074.76, with interest thereon from November 28, 1900.

"The decision of the controversy turns on the meaning of the words 'whole insurance,' as used in the apportionment clause of the defendant's policy. It was there provided that the defendant should not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property.

"There is no disagreement as to the amount of insurance made by the defendant's policy, which was absolute, but the controversy is over the amount made by the four other policies, which were not absolute, owing to the coinsurance clause. The defendant claims that the whole insurance was \$60,000, comprising the \$42,500 made by its own policy and \$17,500, or the greatest sum for which, in any event, the four companies could become liable, and that the plaintiff was a coinsurer to the extent of the difference between the amount for which they are liable and the maximum amount for which they might be liable. This would reduce the indemnity furnished by the defendant's policy from \$38,177.26, the amount claimed by the plaintiff, to \$32,102.50, the amount paid by the defendant. The plaintiff claims and the Appellate Division held, that under the circumstances 'the amount of insurance effected by the four policies is identical with the amount of the loss, and that the extent of that insurance could not be ascertained until after a loss, for the insurance was to an amount not exceeding a stipulated sum, and was, therefore, indefinite.' This conclusion gives no force to the apportionment clause in the defendant's policy when construed in connection with the coinsurance clause of the other policies. Moreover, all five insurance policies, including that issued by the defendant, are indefinite in the same

way, for they all make insurance to an amount not exceeding a sum named, which is usually regarded as the amount of insurance effected. The four companies stipulated that they should 'be liable for no greater proportion' of the loss, which was \$45,321.18, 'than the sum hereby insured,' or \$17,500, 'bears to 80 per cent. of the cash value of the property,' which was \$99,728. Their liability, therefore, is represented by the following proportion: As \$99,728 is to \$17,500, so is \$45,321.18 to the amount required, or \$7,952.84. Was this 'the whole insurance' effected by the four policies containing the coinsurance clause? If so, that clause has no effect in this case. We think it was not, for, if the loss had been greater, the amount called for by the policies would have been greater also, and yet it could not have exceeded the amount of the insurance. The largest sum which, in any event, can be collected under a policy and not the smaller sum which may be collected under special circumstances, is the amount of the insurance effected by the policy. There is no limit to the possible liability under the four policies, except the amount that the companies stipulated it should not exceed, aggregating \$17,500, which they would have been obliged to pay if the loss had been total. Under an open policy, if the loss is less than the insurance, the former measures the liability, but if the loss is greater than the insurance, the latter measures the liability; yet in either event the amount of insurance is the same. The amount of the insurance, therefore, is the largest sum that the company, under any circumstances, according to the terms of the policy, can be required to pay. That is the popular understanding, as well as the legal definition. The test is, what is the extent of the indemnity furnished under any possible circumstances? The insurance effected by the four policies was for a proportion of the cash value of the property less 20 per cent., which can always be represented by a fraction, the numerator being unchangeable, while the denominator may vary from time to time. The numerator is the highest amount which the companies could be required to pay, while the denominator is 80 per cent. of the cash value of the property. The amount of the insurance does not vary, but the cash value of the property is subject to change; still that change does not reduce the amount of insurance. The fact that the owner ran his own risk or became his own insurer as to the 20 per cent. of the cash value of the property did not lessen the amount of insurance, because, if the loss had been total, the whole \$17,500 would have been due upon the four policies. Thus the effect of the coinsurance clause is that, if

the property is insured to 80 per cent. of its value, or more, in case of a total loss the whole sum insured becomes due; but with insurance for less than 80 per cent. of the value and a loss also of less than 80 per cent., the owner becomes, in effect, a coinsurer proportionately. He could have procured insurance to 80 per cent. of the value, but, not having done so, he became his own insurer *pro tanto*. This accords with the way the clause is characterized in the policies, for it is entitled 'Percentage Coinsurance Clause,' which means insurance by the company and the owner, depending upon the percentage or proportion which the insurance bears to the value. The object is through lower premiums to induce the owner either to take out insurance to 80 per cent. of value, or to become a coinsurer with less risk to the company in case of a loss falling below such percentage of value. Where either the loss or the insurance equals or exceeds 80 per cent. of value, the clause has no effect, but when both are less the insured and the insurer bears the loss in certain proportions. The amount of insurance is not the variable factor, but the amount of loss. The amount of insurance is at all times the same, but when the loss is partial the insurer stands only a part, unless the insurance is for the full percentage, whereas, if the loss is total, the insured stands all, not exceeding the limit stated in the policy. That limit is the amount of insurance made by the policy, because the company may be required to pay to that extent. The words of the coinsurance clause, viz., 'the sum hereby insured,' indicate the amount of insurance. That sum is fixed, definite, and always the same. It should not be confounded with the actual liability under special circumstances, for all open policies are necessarily indefinite as to the sum to be paid until the amount of the loss is known. The liability can never exceed the value of the property, but the insurance may, for a house worth but \$1,000 may be insured for \$2,000. If thus insured by two companies, one-half in each, and the property was wholly destroyed by fire, neither would have to pay \$1,000, the amount of its policy, but only \$500, the amount of its liability, owing to the apportionment clause. This would be true of a standard policy even if one of the companies was insolvent, so that the insured by taking out other insurance may reduce his security while intending to increase it. In the case before us the plaintiff, by procuring the four policies, reduced his security in the event of a partial loss, but increased it in the event of a total loss. For the purpose of apportionment, the face value of the policies should be resorted to, regardless of the cash value of the prop-

erty, and thus the whole amount of the insurance can be ascertained by a simple inspection of the policies. The face value of a policy is not reduced by the actual value of the property, or by the duty of apportioning the loss, or by the effect of a coinsurance clause in another policy on the same property. The amount of insurance is fixed at the inception of the policy, but the amount of liability is not fixed until a loss has occurred. The one depends upon the sum for which the policy is written, but the other depends upon a number of contingencies which may or may not happen, and hence cannot be known in advance. The fact that they are not known, and may never come into existence, does not affect the amount of the policy. The question involved is new, and we are without controlling authorities to guide us, but the discussion of a subject somewhat related in a recent case has aided us in reaching the conclusion announced. *Continental Ins. Co. v. Ætna Ins. Co.*, 138 N. Y. 16, 21, 33 N. E. 724.

It may be asked why, if the whole insurance was \$60,000, the plaintiff is not entitled to recover his entire loss, which was but \$45,321.18, and the answer is that he agreed in a certain contingency to stand part of the loss himself. He accepted four policies, which provided for the payment to him of not exceeding \$17,500 in case of a total loss, or in case the loss was partial, and his insurance amounted to 80 per cent. of the cash value; but he agreed that, if both loss and insurance were each less than 80 per cent., to take less than the amount of his loss, and thus became a coinsurer for the difference. The defendant, pursuant to its apportionment clause, is entitled to the benefit of all other insurance, whether made by another company alone or by a contract between another company and the insured, by which, in case of partial loss, each stands part as a coinsurer. We think that the 'whole insurance' was \$60,000, the face value of all the policies, and that the judgment appealed from should, therefore, be reversed, and judgment ordered for defendant on the merits, with costs."

As the opinion of the Wisconsin Supreme Court in the Stephenson case, follows substantially the same line of reasoning, it is not deemed necessary or advisable to insert it.

RULE 24.**Construction and Application of a Coinsurance Clause.**

Where an insurance company under the operation of an 80 per cent. coinsurance clause was to insure \$3,000 of a total insurance of \$8,000 to be secured and maintained, and only \$2,000 addition is thus secured (being two policies, \$1,000 each, without any coinsurance clause), it assumed only such proportion of the \$2,000 as the \$3,000 bore to the \$5,000 total insurance agreed to be maintained; the amount of insurance by its policy is thus taken at \$1,200 and the whole insurance as \$3,200; the liability of the first company is, therefore, three-eighths of the loss and of each of the other two companies five-sixteenths instead of three-fifths, one-fifth, and one-fifth respectively.

Armour Packing Co. v. Reading Ins. Co., 67 Mo. App. 215.

This case appears to be in sharp conflict with Rule 23, and perhaps should have been inserted as an exception under that rule. But it was decided by an appellate court, and remains a rule at least in that State (Missouri) until modified or changed by the court which declared it, or by a higher court. Thus it is inserted as a separate rule with a caution of probable limited application in view of the authoritative decisions under Rule 23, and the reasoning of the opinions of the courts thereunder.

The facts in the Armour case were submitted to the court upon an agreed statement which showed that the defendant company had issued its policy for \$1,000 on certain described property, and containing the apportionment clause of the New York standard form, but without coinsurance clause. The Knoxville Insurance Company had also issued its policy for \$1,000 on same property, and concurrent with preceding, with apportionment clause substantially same, and also without coinsurance clause. The Phoenix Insurance Company had also issued its policy on same property for \$3,000, with substantially same apportionment clause; but this policy had a coinsurance clause reading as follows: "It is a part of the consideration of this

policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property covered by each item of this policy to the extent of at least eighty (80) per cent. of the actual cash value thereof, and that failing so to do, the assured shall be an insurer to the extent of such deficit, and to that extent shall bear their proportion of any loss."

The property in question covered by the three policies was damaged to the amount of \$2,200. The actual cash value of the property covered was \$10,000, and above was all the insurance. The defendant claimed that it was liable for only one-fifth of the loss, or \$440. The plaintiff claimed it was liable for \$687.50, or five-sixteenths, and recovered judgment for that amount. The court, on appeal, after reciting the facts, says: "It is thus seen that the agreement with the Phoenix Company was that it would insure plaintiffs' property to the amount of \$3,000, provided plaintiffs should place \$5,000 more insurance elsewhere, and thus carry a total insurance of \$8,000. Had these conditions been carried out, the Phoenix Company would have been bound to pay three-eighths of the actual loss, \$2,200, and the other companies the remaining five-eighths. But plaintiffs failed to secure the \$5,000 additional insurance, necessary to make the total amount \$8,000, but only succeeded in placing \$2,000 of the required \$5,000. Now the question is, under these altered conditions, for how much were the plaintiffs actually insured in the Phoenix Company, and what was the whole insurance? If the Phoenix was to assume \$3,000 of the risk in case the other companies took \$5,000, then when the latter only took \$2,000 it is plain that the Phoenix Company only assumed such a proportion to the \$2,000 actually taken by the other companies, as \$3,000, the sum the Phoenix originally agreed to take (upon conditions above stated), bears to \$5,000, the amount plaintiffs agreed to place with the other companies. The rest is simply a question of mathematics. The problem worked out by the old "rule of three" shows the amount to be \$1,200. The total amount of insurance, therefore, was \$3,200, of which the Phoenix carried three-eighths, or \$1,200, and each of the other companies five-sixteenths, or \$1,000, and in such proportion the actual loss should be apportioned among the three companies — the Phoenix three-eighths, or \$825, and the Reading and the Knoxville companies, \$687.50 each."

RULE 25.

Three-Fourths Clause Must be Considered.

A three-fourths clause limiting the value and liability of the company must be taken into consideration in fixing the value of property as basis of apportionment.

Haley v. Dorchester Ins. Co., 12 Gray (Mass.), 545; *Millis v. Scottish Union & Nat. Ins. Co.*, 95 Mo. App. 211, 68 S. W. Rep. 1066. And see *Brown v. Quincy Ins. Co.*, 105 Mass. 396; *Ashland Ins. Co. v. Housinger*, 10 Ohio St. 10; *Farmers' Ins. Co. v. Graybill*, 74 Pa. St. 17.

RULE 26.

Effect of Fractional Insurance on Amount of Loss.

When policy insures for a certain amount in the aggregate, and is divided into a number of separate items, according to the entire estimated valuation or amount, each of which is stated to be insured to extent of a specified fraction thereof, amounting in the aggregate to the whole sum insured, such fraction limits the amount of the insurance, and does not limit or determine the amount of the loss. The amount of liability is determined by the proportion which the amount insured by the policy bears to the total insurance.

Illinois Ins. Co. v. Hoffman, 132 Ill. 522, 24 N. E. Rep. 413; *Hoffman v. Minneapolis Ins. Co.*, 42 Minn. 291. And see *Westinghouse Electric Co. v. Western Assur. Co.*, 42 La. Ann. 28, 7 So. Rep. 73; *Insurance Co. v. Ayers*, 88 Tenn. 728; *Hoffman v. Insurance Cos.*, 88 Tenn. 735.

RULE 27.

Effect of Limitation as to Amount upon Specific Subjects.

When policy in terms limits the value of the subject-matter of the insurance, as for instance so much in the aggregate, but not to exceed a certain amount upon any one subject, such limitation must be taken into account in determining the total amount of insurance as basis of apportionment of the loss; a policy covering same subject without such limitation must make good the balance of the entire loss.

Sherman v. Madison Ins. Co., 39 Wis. 104.

In this case it appeared that each of three policies upon live-stock contained the same provision for apportionment of the loss. One policy insured the stock generally in the sum of \$1,500. Of the other two, each in the sum of \$1,666.67, one provided that no animal should be valued at more than \$500, and the other, that the insurer should pay no more than \$500 loss on any one animal. The insured lost by fire two steers valued at \$336, and one bull valued at \$2,000. In an action on the \$1,500 policy it was *held*

(1) That the plaintiff was entitled to recover from the three insurers the whole amount of his loss.

(2) That each of the insurers was liable to him for that proportion of the value of the two steers which the whole amount insured by its policy bears to the whole amount insured by the three policies together.

(3) That as to the value of the bull lost, the liability of one of the other insurers being limited to \$500, while that of the second is limited to its proportion of \$500 as the stipulated value of the animal, defendant is liable for such additional sum as will make good the whole loss of \$2,000 on the bull, and the loss as apportioned by the court as appears by the report was as follows:

	On steers.	On bull.	Total.
Continental	\$115 83	\$500 00	\$615 83
North Missouri	115 83	172 42	288 25
Madison Mut.	104 34	1,327 58	1,431 92
Totals	<u>\$336 00</u>	<u>\$2,000 00</u>	<u>\$2,336 00</u>

RULE 28.

When Policies Cover Various Subjects in Different Places with Different Limitations as to Amount.

Where one policy insures various subjects in different places to amount, for instance, three thousand dollars with loss not to exceed *six hundred* dollars on any one subject; and another policy insures in same amount and with same description, except that the limitation is *three hundred* dollars on any one subject, the total insurance as basis of apportionment in event of loss of one of the subjects amounts to *nine hundred* dollars, of which the respective proportions of liability are two-thirds and one-third.

Golde v. Whipple, 7 App. Div. 48, 39 N. Y. Supp. 964.

RULE 29.

Apportionment not Construed to Relieve Companies from Liability — Modification or Limitation by Special Clauses.

Where there are general policies upon one entire subject or subjects and special policies on parts of it, there can be no theory of apportionment among the several policies which will relieve the general policies from liability to their full amount until the insured receives complete indemnity for his loss. If the loss on the whole subject is greater than the amount of all the policies, both general and special, the general policies should be paid in full;¹ and so as to the specific policies;² but this rule may be rendered inapplicable or varied or modified by special clause in general policy, limiting or excepting liability as to property specifically insured.³

1. *Niagara Ins. Co. v. Henan*, 81 Ill. App. 679, *affd.*, 181 Ill. 575, 54 N. E. Rep. 1052. And see *Angelrodt v. Delaware*

Ins. Co., 31 Mo. 593; *Lesure Lumber Co. v. Mutual Ins. Co.*, 101 Iowa, 514, 70 N. W. Rep. 761.

2. *Royal Ins. Co. v. Roedel*, 78 Pa. St. 19.

3. *Fairchild v. Liverpool, L. & G. Ins. Co.*, 51 N. Y. 65, affg. 48 Barb. 420. And see *Merrick v. Germania Ins. Co.*, 54 Pa. St. 277; *Peabody v. Liverpool, L. & G. Ins. Co.*, 171 Mass. 114, 50 N. E. Rep. 526; *United Ins. Co. v. Powell*, 94 Ga. 359, 21 S. E. Rep. 565; *Macon Ins. Co. v. Powell*, 116 Ga. 703, 43 S. E. Rep. 73. See also Rules 17, 30 and "Exemptions, Exceptions, and Limitations," Rule 18.

RULE 30.

Loss Must be Made Good, Except when Insured Has Agreed to Stand Part of it.

Any rule of apportionment is objectionable which does not in result make good the loss sustained by the assured;¹ except where the policy by coinsurance or other special clause or condition imposes in effect a part of the loss upon him;² or the other policies are invalid or void, or the companies are insolvent.³

1. *Angelrodt v. Delaware Ins. Co.*, 31 Mo. 593; *Sherman v. Madison Ins. Co.*, 39 Wis. 104; *Deming v. Merchants' Cotton Co.*, 90 Tenn. 306, 347, 17 S. W. Rep. 89; *Schmaelzle v. London & Lancashire Ins. Co.*, 75 Conn. 397, 53 Atl. Rep. 863. And see Rule 29.

2. See Rule 23.

3. See Rules 1 and 11.

RULE 31.

Effect of Excepting Property Specifically Insured.

A floating policy excepting property "specifically covered" by other insurance does not apply to or cover such property until, by removal from the warehouse or place of deposit, or otherwise, it loses the protection afforded by the specific insurance.

Macon Ins. Co. v. Powell, 116 Ga. 703, 43 S. E. Rep. 73. See "Exemptions, Exceptions, and Limitations," Rule 18.

RULE 32.

General and Specific Policies — Construction and Application by the Court — Liability of Specific Policy.

General, compound, or blanket policies insuring the property described in such a policy, and a part of such property being covered by other *specific* policies, cover the property so described, to their full amount in case of loss upon that part of the property described in the specific policies, and when there is no loss on the other property as described in the compound policies; in such a case the company issuing the specific policy is liable for no greater proportion of the loss than that which the amount of such policy bears to the total amount of both the compound and specific policies, covering the property it describes.

Page *v.* Sun Ins. Office, 74 Fed. Rep. 203, 20 C. C. A. 397, 36 U. S. App. 672, 25 Ins. L. J. 865, affg. 64 Fed. Rep. 194. And see *Schmaelzle v. London & Lancashire Ins. Co.*, 75 Conn. 397, 53 Atl. Rep. 863.

In *Page v. Sun Ins. Office*, the plaintiffs held policies to amount of \$40,000 on lumber, etc., covering the *entire* property, situated on two blocks, known as the easterly and westerly blocks, respectively. They also had specific insurance to amount of \$10,000 on that part of the lumber, etc., situate on the *westerly* block. The fire caused a loss of \$30,982.02 on the *westerly* block *only*. The defendant had one of the *specific* policies on the westerly block amounting to \$2,500. The United States Circuit Court of Appeals, enunciating and applying the above rule, under a construction of Rule 1, or of the standard form, and rejecting other rules urged to the contrary as a basis of an equitable apportionment, etc., held, that the whole amount of insurance was \$50,000, and that the defendant was liable only for 2500/50000, or one-twentieth of the loss, amounting to \$1,549.10.

RULE 33.

Same Subject — How Whole Insurance Determined — Insurance Itemized.

Where policies cover specific sums under several specific items, and another policy, by a general or blanket description, covers all the property described under one item, and the property is totally destroyed to a value less than the total insurance, the "whole amount of insurance" as a basis of apportionment is determined by appropriating so much of the blanket insurance to each of the items in proportion as follows: as the value of the whole property destroyed is to the whole blanket insurance so is the value destroyed of each item to the insurance on each item. The insurance on each item under the blanket policy being thus ascertained, to it is added the insurance under each item in the other policies, the result giving the whole amount of insurance as to each item as the basis of apportionment. The liability of the particular company is then determined under Rule 1 by ratio of amount of its insurance to the whole amount of insurance on each item.

Chandler v. Insurance Co., 70 Vt. 563, 41 Atl. Rep. 502.

In this case the defendant company covered specific sums on three items, viz.: \$562.50 on item a, \$612.50 on item b, and \$325 on item c. Plaintiffs also had another like policy for \$262.50 on item a, \$375 on item b, and \$112.50 on item c. He also held blanket policies, insuring same property under one item to amount of \$12,700. Property was totally destroyed, loss being full value, and less than the total amount of insurance. The loss under the several items was \$3,491.48 on a, \$6,230.37 on b, and \$2,014 on c, making a total loss of \$11,736.55.

The court said: "The question presented is, what proportion of the loss shall the respective companies pay? The rule

which must be applied to determine this is a legal, just, and equitable one, and is found in the policies. It is, that each company shall pay such proportion of the loss as the sum insured by it bears to the total insurance. The difficulty in adjusting the proportion which each company shall pay arises from the fact that some of the policies are specific and others blanket. As by the terms of the specific policies they cannot be converted into blanket policies, it necessarily follows that the only way in which the loss can be adjusted is to turn the blanket policies into specific ones, i. e., determine how much of the full amount of a blanket policy shall be apportioned to each of the three respective items, according to their respective values. The value of the items as shown by the loss is as follows: Item a, \$3,491.48; item b, \$6,230.37; item c, \$2,014.70, equals \$11,736.55.

"Apportioning the amount of the blanket policies, \$12,700, upon the amount of the loss by using the proportion, as the value of the whole property is to the whole blanket insurance, so is the value of each item to the insurance on each item, we find the insurance on each item to be: Item a, \$3,778.09; item b, \$6,741.82; item c, \$2,180.09; equals \$12,700, and the total amount of the insurance on each item to be, item a, \$4,603.09; item b, \$7,729.32; item c, \$2,617.59.

"As each company pays in the ratio that the amount of its policy bears to the total amount of insurance, the defendant is liable in respect to item a, \$426.66; item b, \$493.73; item c, \$250.14; equals \$1,170.53, the amount for which judgment was entered below. The judgment was correct and is affirmed."

In this case the Vermont Supreme Court seems to adopt and apply in substance, or principle, what is known as the Griswold or Kinnie Rule of Apportionment, which is to the same effect when there are blanket and specific policies, in making the *amount of loss* as to the several subjects or items the basis of ascertaining the whole insurance thereon; until one of two results is reached, that the insured receives the whole amount of his loss, or the policy or insurance is exhausted. And see Rule 35.

RULE 34.

Same Subject — Insurance Itemized.

Where one policy covers property by general or blanket description and another policy covers same in separate items, with separate amounts on each item,

the items upon which there is a loss should be taken up in the order of the greatest losses, the whole property being divided for this purpose into items corresponding to those designated in the specific insurance; in computing the total amount of insurance upon the first item the full amount of the blanket insurance be applied and the full amount of any given blanket policy be regarded as the amount of insurance upon the item under such policy; in respect to the second and subsequent items the same rule should be adopted, save that the total amount of insurance thereon be reduced by the amount of blanket insurance already exhausted in the settlement upon former items, and the amount of insurance under any given blanket policy likewise reduced by the amount thereof used in prior adjustments; the loss should be apportioned according to the results obtained when it works out substantial equity and justice to all concerned.

Schmaelzle v. London & Lancashire Ins. Co., 75 Conn. 397, 53 Atl. Rep. 863.

It would seem from above that the Connecticut Supreme Court adopts substantially what is known as the Hartford rule of apportionment. This rule as it had been used and recognized before is to the effect that:

Blanket insurance counts for its full amount with the specific to pay the loss on the item covered by specific insurance on which there is the largest loss. The remainder of the blanket insurance after deducting amount of loss thus apportioned to it counts with the specific insurance on the item having the next largest loss. This method of computation is followed until the loss is fully paid, or the compound or blanket policy is exhausted.

The *Schmaelzle* case above cited being the latest, and the opinion of the court being both important and instructive it is here inserted as follows:

"The plaintiff is the owner of premises upon which stood a brewery and shed. In the brewery were machinery and stock.

Upon the buildings, machinery, and stock the plaintiff carried in some thirty-four companies insurance against fire aggregating \$60,000 in amount. These policies were all of the standard form, and contained the following provision: 'This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent companies, covering such property. Thirty-one of the policies, covering insurance for \$55,000, were of the kind known as 'blanket' or 'compound' policies; that is, they insured said buildings, machinery, and stock as a whole, and without distributing the amount of the insurance among the several items. The remaining policies, containing insurance for \$5,000, were of the kind known as 'specific;' that is, the amount insured thereby was distributed among the several items of property, a specified amount to each item. Each of these specific policies covered in the whole precisely the same property as did the compound insurance, but distributively. This distribution was uniform among the specific policies, and was among four separate items, to wit, the main or brewery building, stock, machinery, and shed, as follows: \$1,634.88 on the brewery, \$1,839.21 on the stock, \$1,498.64 on the machinery, and \$27.24 on the shed. A fire damaged the brewery, stock, and machinery. The sound value of the property injured was \$59,982, divided as follows: Brewery, \$20,586; stock, \$11,085; machinery, \$28,111, and shed, \$200. The loss by fire was mutually adjusted at \$42,953, distributed as follows: Brewery, \$15,115; stock, \$11,085; machinery, \$16,753, and shed, 0.

"It is conceded that the assured is entitled to receive from the defendants the amount of his loss above stated. The only question in the case is one between the several defendants as to the sum which each should pay. Between the blanket insurers there is no dispute, and between the specific there is none. The contention is between the two classes of insurers, and is as to the method to be employed in the apportionment of the loss in view of the provisions as to prorating which appear alike in all the policies and which has been quoted. It is clear that the compound and the specific insurance must be brought together in the prorating. This necessarily involves an adjustment by separate items, and the application in some way of the blanket insurance to each item covered by specific insurance. The question is as to how this shall be done. The claim of the blanket insurers is that their policies should, for

the purpose of the distribution of the loss, be converted into specific ones; specific amounts under the policies being set out to each item upon which there is a specific insurance, so that, for the purpose of determining the amount that any blanket policy shall contribute toward any item of loss upon which there is a specific insurance the amount of the blanket policy's insurance upon such item and the total amount of insurance thereon shall be computed upon the basis thus ascertained. The methods suggested for making this conversion from compound to specific are two, both of which are claimed as having the approval of authority and experience. One method is to distribute the amount of the blanket policy over the property insured by it so that the items bearing specific insurance shall be credited with insurance to such a proportionate amount of the whole as the sound value of the specific item bears to the sound value of the whole. The other is to make this conversion upon the basis of the respective losses upon the property insured. The specific insurers, upon the other hand, contend that there should be no such conversion, but that in adjusting each item of loss the total amount of insurance thereon and the amount insured by each blanket policy be determined by including the entire amount of the compound insurance which has not been previously exhausted in adjusting some other item. The widely differing results to which the two claims might lead are apparent. In making these claims and others which are incidental to them, all the parties concede that, whatever general rule of apportionment of loss may be adopted, it must, in so far as it is not directly prescribed by the contract, yield in case of need to the interests of the assured. The first requisite of any method of apportionment sought to be applied must be the assured's protection to the full extent of his rights under his policies. Any method which, in a given case, fails to afford him the full measure of his just indemnity must give place to another which will. In the present case the plaintiff has no concern as to which of the suggested modes be adopted in distributing his loss among his insurers. The interests of the latter are alone involved. The whole question arises out of the application to the facts of the case of the provisions of the prorating clause in the policies. Each insurer has not entered into an unqualified obligation to indemnify the assured to the extent of his loss, or to the extent of his loss limited to the amount of the policy. It has made a contract which gives it, as against the assured, a benefit arising from coinsurance. It stipulates that its liability shall be limited in amount dependent upon the ex-

istence and amount of such coinsurance. The policy expressly states how its liability shall be determined. The question, therefore, becomes one of contract construction. It is not one of equitable determination in the absence of an agreement, as was the case in certain of the adjudicated cases. We are not called upon to adjust the equities between coinsurers, one having paid more than his fair share of the loss. We are not dealing with the doctrine of subrogation. The parties have recorded their agreement, and we have only to determine its meaning and enforce it.

"The policy provision, to restate its pertinent portion, is: 'This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance.' It is thus provided that the mode to be employed in determining the extent of liability is purely a mathematical one, involving the stating of a problem in simple proportion. The three known terms of the proportion, from which the fourth, to wit, the amount of the liability under the given policy, is to be deducted, are stated to be the whole insurance, the amount insured under the policy, and the loss. The loss is in this case an ascertained sum. In any it is a determinable one. Where the given policy is a specific one, the second term is also a definite one, and only the first remains open to question. If the given policy is a blanket one, then both the first and second terms are subject to dispute. An answer to a single question, however, resolves all. That question which thus stands out as the controlling one in the situation is thus seen to be this: 'By the terms of a blanket policy, what amount of insurance attaches to each item embraced within the insurance?' The answer to this question is not a hidden one. The characteristic features of a blanket policy are well understood. Its very essence is that it covers to the full amount every item of property described in it. If the loss on one portion or item of the property exhausts the full amount of the policy, the whole insurance must be paid. There can be no apportionment of it. In the absence of a prorating clause, one blanket insurer among many insurers, whether blanket or specific, may be sued, and he must pay the whole loss, if it is not in excess of his policy. His payment will give him certain equitable rights of contribution as against his coinsurers, but his legal obligation to pay the assured cannot be questioned. The contract holds him to that. These principles are elementary. It is in such particulars as these that blanket policies differ from specific. The

difference is one which inheres in the nature of the two contracts, and has its recognition in the accepted advantages of a blanket policy to the assured and its disadvantages to the insurer, and in the more exacting terms which are customarily demanded for its issue. The answer to our question must, therefore, be that the whole amount insured by a blanket policy attaches, and invariably attaches to each item thereunder. The blanket insurers concede the peculiar character which, in general, inheres in such policies, but they say that for the purpose of the contributing clause they are entitled to an apportionment of their insurance in cases of adjustment in connection with specific insurers. We fail to see anything in this claim but an appeal from the contract made to assumed principles of fairness and equity. It certainly does not rest on any logical foundation. The palpable answer to it is found in the fact that the question is one of legal construction of an express contract obligation, and not of equitable determination. The parties having made a contract, the courts are powerless to change it. What the blanket insurers ask is, in effect that there be read into their policies a provision which is not there. Had the parties wished, this provision might easily have been incorporated. It was not, and the contract must stand as made.

"We have thus far discussed the question at issue as one of reason, and not of authority. The analogous cases are few. They are, however, to be found. Concerning them it has to be confessed that the majority which have arisen under the operation of the prorating clause have adopted the compound insurers' view. It is noticeable, also, that of these all save a few state the proposition as a dictum, or imply its correctness without argument or reason therefor. Such are the cases of *Blake v. Insurance Co.*, 12 Gray (Mass.), 272; *Cromie v. Insurance Co.*, 15 B. Mon. (Ky.) 432; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. Rep. 761. In *Chandler v. Insurance Co.*, 70 Vt. 562, 41 Atl. Rep. 502, the court attempts to give a reason for this position. It is contained in these words only: 'As by their terms the specific policies cannot be converted into blanket policies, it necessarily follows that the only way in which the loss can be adjusted is to turn the blanket policies into specific ones.' This is a clear case of *non sequitur*. The syllogism involved assumes for its major premise the existence of a necessity which does not exist. It is practically as simple to adjust a loss by not apportioning as by apportioning the blanket insurance. In *Odgen v. Insurance Co.*, 50 N. Y. 388, 10 Am. Rep. 492, the court finds its reason in the fact that it was unreasonable to

assume that any of the parcels included in the blanket insurance was over insured where the total insurance was not in excess of the total value. What method of adjustment this argument would have led the court to adopt had concurrent compound policies for different gross sums been involved was not stated. An assumption of that situation sufficiently discloses the fallacy of the case. Of all these cases it is to be observed that none attempt to lay down a rule of universal, or even general, application. They treat each case of itself, conceding that in the next the rule might not apply. The trouble has been that in ignoring the contract all has been left to arbitrary and uncertain action, which fairness and equity in the given cases seemed to dictate. In *Page v. Insurance Co.*, 20 C. C. A. 397, 74 Fed. 203, 33 L. R. A. 249, the other side of this question is distinctly avowed. The decision is put squarely upon the terms of the contract. The argument, although brief, is substantially that which has guided us. In *Sherman v. Insurance Co.*, 39 Wis. 104, also, this doctrine receives at least implied sanction.

"One other point remains to be considered. As the existence of the specific policies compels the adjustment of the loss by items, these items must be taken up in some order. This order might very materially affect the result both as respects the companies and the insured, since that portion of a blanket policy which is exhausted in the settlement upon the first item no longer remains to be applied to the second item, and so on through the list. This matter of order is one upon which the policies in suit and policies ordinarily are silent. Evidently nothing remains but some arbitrary selection, in which the considerations influencing a choice should be what, on the whole, under the conditions, best satisfies the ends of fairness and justice as between the companies, the assured being given his rightful amount of indemnity. A little study of the peculiar situations which may arise may convince one that no rule of universal and unvarying application can be safely laid down. Whether one suggests the order of the greatest losses, or of the least losses, or the order of enumeration in the special insurance, or an order to be determined by lot — two at least of which methods appear to have been used — or some other order, he will quite likely be met with an assumed situation in which his system seems to fail to fully accomplish equity and justice. Fortunately, we have no need to search for a universal rule. In the present case it matters not to the assured, and little to the insurers, what order of adjustment is adopted. The order first indicated, to wit, that of the greatest losses, is one which, as a

general rule, has some considerations in its favor. In this case it works out substantial equity and justice to all concerned. We, therefore, select it for the purposes of this case as on the whole the best.

"The Superior Court is advised that in the adjustment of the plaintiff's loss, and its apportionment among the defendant companies, the items upon which there was loss be taken up in order of the greatest losses, the whole property being divided for this purpose into items corresponding to those designated in the specific insurance; that in computing the total amount of insurance upon the first item the full amount of the blanket insurance be applied, and that the full amount of any given blanket policy be regarded as the amount of insurance upon the item under such policy; that with respect to the second and subsequent items the same rule be adopted, save that the total amount of insurance thereon be reduced by the amount of blanket insurance already exhausted in the settlement upon former items, and the amount of insurance under any given blanket policy likewise reduced by the amount thereof used in prior adjustments, and that judgment be rendered against the several defendants according to the results thus obtained. The other judges concurred."

RULE 35.

Construction of "Described Property" and "Covering Such Property" — Blanket Policy.

The phrases "described property" and "covering such property" in the apportionment clause (see Rule 1) are construed in their relation to the word "loss," and refer to and are applied to property damaged and destroyed. The construction in case of a blanket policy is that in case of loss the company is not liable for a greater proportion of it than the amount insured by its policy bears to the whole insurance on the property destroyed.

Lesure Lumber Co. v. Mutual Ins. Co., 101 Iowa, 514, 70 N. W. Rep. 761.

In this case the court says: "The policy in suit was for the sum of \$10,000, and covered all the lumber in three yards owned

by the plaintiff, and referred to as the 'north yard,' 'south yard,' and 'yard north of Seventh street.' The entire insurance on the lumber in the three yards amounted to \$115,000. Policies to the amount of \$14,500, called 'blanket policies,' including that in suit, covered all the lumber in the three yards. In addition, there was specific insurance to the amount of \$54,000 on the lumber in the north yard, and to the amount of \$46,500 on the lumber in the south yard. The lumber in the yard last named was uninjured. The loss sustained in the other two yards was \$74,478.85, while the blanket and specific insurance upon the property lost was but \$68,500. The defendant contends that its liability for the loss is as \$10,000, the amount of its policy, is to \$115,000, the total amount of insurance on the three yards, or for two-twenty-thirds of \$74,478.85. It tendered to the plaintiff that amount, \$6,476.42, with interest from the termination of sixty days from the notice and proof of loss to the date of the tender. The plaintiff contends that this is not a case for the application of any rule of apportionment; that, as the value of the property lost was greater than the insurance upon it, the defendant is liable for the full amount of its policy and interest — and the District Court so held. The policy was designed to secure the plaintiff against loss by fire in any or all of the yards to the full amount of the policy. It covered all of the property which was destroyed, and if it is paid in full, it will not fully compensate the plaintiff for the loss sustained. In ascertaining the amount of insurance, for the purpose of an apportionment, it would be just, in the absence of a stipulation to the contrary, to consider only the insurance on the property injured or destroyed; and it will be presumed, in the absence of a showing to the contrary, that the parties to the contract intended to provide for a just result. The language they used does not necessarily mean that in case of loss the defendant should only be liable for such proportion of it as the amount it insured was to the total insurance on all of the property described in its policy, whether the concurrent insurance was on all of the property, or only a part of it. We think a permissible, and the correct, interpretation of the policy is that in case of a loss the defendant was not to be liable for a greater proportion of it than the amount of its policy bore to the total insurance on the property insured* or destroyed. It is true,

* This word is probably misprint for "*injured*." See last sentence.

the words 'described property,' if not modified, refer to all of the property covered by the policy, and the phrase 'covering such property' is equally comprehensive; but considered in their relation to the word 'loss,' and the purpose for which the policy was issued, we are of the opinion that they should be held to refer to property which should be injured or destroyed."

RULE 36.

Apportionment Under Lloyds Policy.

In apportioning a loss under a Lloyds policy, while the policy itself in the aggregate may bear only its proportionate share of the entire loss, the several subscribers are each liable to full extent of his liability as limited in the policy, and if any pays more than his proper share, as between *themselves*, he has right of contribution as against his associates.

McAllister v. Hoadley, 76 Fed. Rep. 1000; Sumner v. Piza, 91 Fed. Rep. 677. And see Cook v. Loew, 34 Misc. 276, 69 N. Y. Supp. 614.

RULE 37.

Effect of Statute Fixing Amount of Loss — Coinsurance.

Where there is a statute applicable fixing the measure of damage in case of destruction of real property, and same is wholly destroyed by fire, the apportionment clause or condition in the policies is inoperative; each company is liable for the full amount of its policy, each having consented to the other insurance;¹ but a coinsurance clause may be binding on the assured.²

1. Havens v. Germania Ins. Co., 123 Mo. 403, 27 S. W. Rep. 718, 24 Ins. L. J. 321; subsequent appeal, 135 Mo. 649, 37 S. W. Rep. 497; Continental Ins. Co. v. McCulloch, 15 Tex. Civ. App. 190, 39 S. W. Rep. 374; Barnard v. National Ins. Co., 38 Mo. App. 106; Home Ins. Co. v. Weed, 55 Nebr. 146, 75 N. W.

Rep. 539; *Phoenix Ins. Co. v. Peak* (Ky.), 47 S. W. Rep. 1089; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. Rep. 261. And see *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. Rep. 745.

2. *Firemen's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. Rep. 779. For apportionment of loss to a building under the South Carolina statute, see *Cave v. Home Ins. Co.*, 57 S. C. 347, 35 S. E. Rep. 577.

The application of this rule may depend upon the wording of the statutes. See Missouri and other statutes in chapter twelfth.

RULE 38.

Old Rules Rejected by Courts when in Conflict with Contract.

There is no such thing under the standard forms as the Jones Rule, Smith Rule, Finn, Albany, Reading, and other old rules called by various names. There is only one legal rule of apportionment when the three necessary terms are ascertained, and that is prescribed in the standard forms (see Rule 1). The old rules are rejected by the courts whenever they come into conflict with the application of Rule 1,¹ which may itself be superseded by an agreement or stipulation that a verdict against one company shall be for full amount of the loss, to be apportioned among the companies interested, and judgment entered against each for its proportionate loss.²

1. *Page v. Sun Ins. Office*, 74 Fed. Rep. 203, 20 C. C. A. 397, 33 L. R. A. 249, affg. 64 Fed. Rep. 194; *Chandler v. Insurance Co.*, 70 Vt. 563, 41 Atl. Rep. 502; *Schmaelzle v. London & Lancashire Ins. Co.*, 75 Conn. 397, 53 Atl. Rep. 863, citing *Page v. Sun Ins. Office*, 74 Fed. Rep. 203, 20 C. C. A. 397, 33 L. R. A. 249, affg. 64 Fed. Rep. 194. And see *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235.

2. *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. Rep. 904.

In ascertaining the *amount of insurance* and the *amount of the whole insurance*, as two of the essential terms of the proportion, in cases where there are compound or blanket and

specific policies, the courts seem to be inclined to adopt the principles as may be *just* or *necessary* in the particular case, of what has been known as the Cromie rule (see Rules 14 and 15), or the Griswold or Kinnie or Hartford rule (see Rules 33 and 34). Not that any one of these is applicable and authoritative in all cases, but that the judges resort to either when the other in application does not indemnify the insured, or does not accomplish substantial justice to all concerned, upon reasonable construction of the *terms of the contracts*. The *amount* of the *insurance*, and not the amount or *value* of the *property* insured, is always the basis of apportionment, unless (1) it is *necessary* to deduct value or amount of *loss* to a certain subject to ascertain the *amount* of the *insurance* as to balance of property, to remove the difficulty caused by not having itemized the insurance as to its *amount* in the policy (see Rule 14), or (2) where the basis of the apportionment is changed by specific provision. (*Christian v. Niagara Ins. Co.*, 101 Ala. 634, 14 So. Rep. 374, 23 Ins. L. J. 851.)

RULE 39.

Apportionment Must be Pleaded as a Defense.

If company desires to avail itself of apportionment clause in limitation of its liability it must be pleaded by it as a defense. It is not necessary that a complaint should state the amount of other insurance.

Ermentraut v. American Ins. Co., 60 Minn. 418, 62 N. W. Rep. 543; *Ætna Ins. Co. v. McLead*, 57 Kans. 95, 45 Pac. Rep. 73, 25 Ins. L. J. 669. A complaint may state the other insurance. *Continental Ins. Co. v. Coons*, 14 Ky. L. Rep. 136.

The confusion in connection with the subject of apportionment of loss has its origin in the fact that prior to the insertion of the apportionment clause in the policies it was governed by the doctrine in equity of contribution as between the companies. That caused diversity in the number of equitable rules, devised by interested parties, unrestrained by contract, having their primary object in composition, design, and application to shift the burden of loss from one company to another. There have been, perhaps, as many as ten or a dozen different or varying so-called rules, occasionally identified by names of their authors, invoked or made use of by the companies according to changeable circumstances in each case, to obtain relief as against each other. Indeed, it is so frankly admitted by a

well-known author among insurance companies and their representatives (Griswold), who says: "The entire matter being left to the adjuster to adopt such method as may at the moment seem to him most advantageous for his company." When the companies have been usually represented by almost as many adjusters or special agents as there are companies it is not necessary to point out or dwell upon the result in difference of opinion and application of the old rules. It is the continued and persistent attempt under modern and existing conditions to apply these old rules, with their varying effects or results, in behalf of the companies, and rather as between the companies on the loss than as between the insured and the particular company, that has so largely contributed to the problem and confusion created by nonconcurrent policies.

With the insertion of the apportionment clause in the policies, the question ceased to be one of contribution in equity as between the companies and became strictly one of apportionment in law, as between the insured and each company under their several policies or contracts. In effect the companies on payment of a loss severally contribute for that purpose, and in that limited sense it is still true it is contribution, but the practical material distinction is that apportionment is not governed by the equitable doctrine or rules of contribution as between them, but by the construction of the contract as between the insured and the several companies. So far as the insured is concerned these old rules had and have no binding force whatever, or at least have none whenever they conflict with the language of the policies as construed by the courts. Their further consideration or insertion here would serve no useful purpose as they do not agree either in expression or application.

The material inquiries in all cases, whether by the adjuster, special agent, the company, insured, or the court, and whether the policies be concurrent or nonconcurrent, blanket, compound, or specific, are, not whether any one of the old rules applies or can be made to apply in the interest of any particular company or set of companies, but are under the express terms of the policies or contracts:

- (1) What is the *amount of the loss on the described property?*
- (2) What is the *amount of insurance thereon by the particular policy?*
- (3) What is the *whole insurance covering such property?*
- (4) Is there any *special agreement or condition* written upon or attached to the policy or policies, *modifying, limiting or affecting* the above elements, and, if so, to *what extent, if any?*

When all these elements are ascertained or determined from the facts and by construction of the contract the apportionment becomes an application of the arithmetical rules of proportion, by the terms of the policy.

As the *whole insurance* is to the *amount of insurance* by the *particular policy* so is the *amount of loss* to the *amount of the particular liability*. For instance if it be ascertained or determined that the

Loss amounts to \$1,500.

Insurance by the particular policy, \$1,000.

Whole insurance to \$3,000 the proportion would be stated and solved as follows:

$$3000 : 1000 :: 1500 : \text{amount of liability; or}$$

$$\frac{1000 \times 1500}{3000} = \$500 \text{ liability;}$$

or the proportion can be stated and solved as follows:

As the amount of insurance by particular policy is to the whole insurance, so is the amount of particular liability to the amount of loss; that is to say,

$$1000 : 3000 :: \text{amount of liability} : 1500; \text{ or}$$

$$\frac{1000 \times 1500}{3000} = \$500 \text{ liability.}$$

If the loss equals or exceeds the insurance upon the subject, obviously the company or policy is liable for its full amount of insurance upon that subject, thus:

$$3000 : 1000 :: 3000 : \text{amount of liability; or}$$

$$\frac{1000 \times 3000}{3000} = \$1000; \text{ or}$$

$$1000 : 3000 :: \text{amount of liability} : 3000; \text{ or}$$

$$\frac{1000 \times 3000}{3000} = \$1000.$$

So the percentage of liability can be ascertained by application of same arithmetical rules:

As the whole insurance is to the amount of loss, so is 100 to the percentage of liability; or,

$$3000 : 1500 :: 100 : \text{percentage of liability; or}$$

$$\frac{1500 \times 100}{3000} = 50\%, \text{ or } \$500; \text{ or}$$

$$1500 : 3000 :: \text{percentage} : 100$$

$$\frac{1500 \times 100}{3000} = 50\%, \text{ or } \$500.$$

So if *any three* of the above terms are ascertained or determined, the other may be found by application of the same rules, thus:

$$\begin{aligned}
 &3000 : 1000 :: ? : 500; \text{ or } \\
 &\frac{500 \times 3000}{1000} = \$1500, \text{ amount of loss.} \\
 &3000 : ? :: 1500 : 500; \text{ or } \\
 &\frac{3000 \times 500}{1500} = \$1000, \text{ Ins. by Par. Pol.} \\
 &? : 1000 :: 1500 : 500; \text{ or } \\
 &\frac{1000 \times 1500}{500} = \$3000, \text{ whole insurance.}
 \end{aligned}$$

These statements are all put in their simplest form to make clear the underlying principle or rule of apportionment, which applies to all cases, by the terms of the contract, and in modern times is so invariably construed by the courts, though they may differ in construction and application.*

While impossible or impracticable to insert a statement of all the various complications arising from nonconcurrent forms or descriptions, or from compound or blanket and specific policies, perhaps those most frequently to be found in experience are in substance as follows:

(1) When one policy covers property under a general or blanket description, and the other policy or policies cover the

* The arithmetical rules of proportion are:

(1) If three terms of a proportion are given the fourth may be found, if it is an extreme, by dividing the product of the means by the given extreme; or if it is a mean, by dividing the product of the extremes by the given mean.

(2) The first and fourth terms of a proportion are called the extremes; the second and third terms, the means.

(3) Write the required term as (?) in the fourth place, and the term having the same unit value in the third place; then consider, from the nature of the question whether the fourth term is greater or less than the third; when greater, place the less of the remaining terms in the first place, and when it is less place the greater term there, and the remaining term in the second place; then multiply the second and third terms together and divide their product by the first. If the first and second terms have different units they must first be reduced to the same unit; if the third term is a compound denominate number, it must be reduced to its smallest unit.

same property, and also other or additional property, but not separated or itemized in the amount of insurance thereon.

(2) Same as the first, except that the other policy *does* have the other or additional property *itemized* in the amount of insurance thereon.

(3) Same as the first, except that the other policy has the *entire property, both the same and additional, itemized* as to the amount of insurance on each item.

(4) Same as the first, except that the other policy covers the *same property only* and by *itemized* description, with *certain amount of insurance on each item.*

To undertake to say just what rules will be applied to these several cases with their possible variations would require more assurance than the writer possesses. It might be suggested, however, that as to the first, if there is to be any apportionment at all, it would necessarily seem to be as provided under Rules 12-15. As to the other cases, if there is conflict in the application of all the rules, that rule would probably be adopted by the courts, in construing the language of the policies to ascertain or determine the three necessary elements of the proportion as preliminary to the determination of the fourth,—which favors the insured, unless he has by special contract or condition agreed to stand part of the loss himself. (See Rules 1, 11, 23, 30. And see "Construction.")

The truth is that the insured is very much at fault in obtaining insurance from different companies, under different descriptions. He has a perfect legal right to do so, but it is not to his interest, because in the event of loss the matter of its adjustment and payment are frequently complicated and delayed by difference of opinion as to its proper apportionment. When the policies read precisely the same, as they should, the apportionment becomes comparatively simple in application, with little or no room for difference of opinion. The insured is himself primarily responsible for the confusion, if any. The insurance companies do not seek such a situation, and even go so far in avoidance of it as to warn the insured, by printed indorsement on their policies in terms as follows:

"It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once." This will be usually found on all the standard forms, except perhaps those of Maine, Massachusetts, and New Hampshire.

CHAPTER SEVENTH.

Payment of the Loss.

- RULE** 1. Time when loss becomes payable and right to commence action as imposed by contract.
2. Period of time prescribed operates as condition precedent.
 3. When time commences to run.
 4. Time as affected by form of statement or proofs.
 5. Time not extended by requirements of the company, but may affect right to sue.
 6. Effect of waiver of proofs.
 7. Denial of liability as waiver.
 8. Demand of payment not necessary.
 9. When interest added.
 10. Effect on interest of independent promise to pay.
 11. Effect of trustee process upon interest.
 12. Claim and suit under Lloyds policy.
 13. Several claims under same policy.
 14. Penalty on refusing payment.

RULE 1.

Time when Loss Becomes Payable and Right to Commence Action as Imposed by Contract.

The loss does not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss have been received by the insurance company, including an award by appraisers when appraisal has been required; no suit or action on the policy for the recovery of any claim shall be sus-

tainable in any court of law or equity until after full compliance by the insured with all its requirements.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	New Jersey,
Connecticut,	North Carolina,
Louisiana,	North Dakota,
Michigan,	*Pennsylvania,
Missouri,	Rhode Island.

By the standard form of policy prescribed in Wisconsin, the loss is payable "sixty days after the notice and proof of loss required have been received by the company." It does not contain above provision.

By the standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

the loss is payable "within sixty days after the insured shall have submitted" the statement required. It does not contain above provision.

In South Dakota the form provides: "The company within sixty days after the assured shall have submitted the statement as hereinbefore provided, shall either pay the amount for which it shall be liable which amount if not agreed upon or determined by the provisions of this policy shall be ascertained by award of appraisers."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

In Iowa a statute prescribes a period of forty days. See statute, chapter twelfth; *Finster v. Merchants' Ins. Co.*, 97 Iowa, 9, 65 N. W. Rep. 1004; *Harrison v. Hartford Ins. Co.*, 59 Fed. Rep. 732, 23 Ins. L. J. 161; *Blood v. Hawkeye Ins. Co.*, 103 Iowa, 728, 69 N. W. Rep. 1141; *Woodruff v. Des Moines Ins. Co.*, 90 Iowa, 735, 57 N. W. Rep. 592; *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. Rep. 16, 23 Ins. L. J. 580. It is not operative in a suit upon a policy in another State. *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. Rep. 756.

*See note to "Duty to Save and Preserve Property," Rule 1, page 2.

RULE 2.

Period of Time Prescribed Operates as Condition Precedent.

The period of sixty days prescribed by Rule 1 must elapse before the assured can demand payment of the loss; the clause in the policy operates as a condition precedent.

Dwelling-House Ins. Co. v. Shaver, 52 Ill. App. 326; *Clemens v. American Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484; *First Nat. Bank v. Dakota Ins. Co.*, 6 S. D. 424, 61 N. W. Rep. 439; *German Ins. Co. v. Hall*, 1 Kans. App. 43, 41 Pac. Rep. 69; *Fire Assoc. v. Colgin*, Tex. Civ. App. , 33 S. W. Rep. 1004; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *Kensington Nat. Bank v. Yerkes*, 86 Pa. St. 227; *Spare v. Home Ins. Co.*, 19 Fed. Rep. 14; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Shawmut Sugar Co. v. Hampden Ins. Co.*, 12 Gray (Mass.), 535; *Davis v. Davis*, 49 Me. 282; *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398; *Cascade Ins. Co. v. Journal Publishing Co.*, 1 Wash. 452, 25 Pac. Rep. 331.

RULE 3.

When Time Commences to Run.

The sixty days' period prescribed before loss becomes due and payable means that when an appraisal has been required the time commences to run from the receipt by the company of the *award* in connection with the proofs; but where no appraisal has been required, the sixty days run from the receipt of the proofs of loss, together with any ascertainment or estimate which may have been arrived at by the assured and the company. If no such ascertainment or estimate, and no appraisal has been required or made, the time runs from receipt of proofs;¹ but where paper furnished as proofs is materially defective and objected to, and it is necessary to complete or amend, and

amended and complete proofs are furnished accordingly, the time runs from time latter are received;² but if there is no objection to proofs first furnished, or they are waived, and an attempt is afterward made to render a fuller statement, it does not invalidate the first or operate to extend the time.³

1. *Lawrence v. Niagara Ins. Co.*, 2 App. Div. 267, 37 N. Y. Supp. 811, *affd.* on opinion below, 154 N. Y. 752; *Schmitt v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767; *McAllister v. Niagara Ins. Co.*, 156 N. Y. 80, 84, 50 N. E. Rep. 502; *Lancashire Ins. Co. v. Barnard*, 111 Fed. Rep. 702, 49 C. C. A. 559. And see *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *Ætna Ins. Co. v. McLead*, 57 Kans. 95; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. Rep. 1005. And see *Williams v. German Ins. Co.*, 90 App. Div. 413, 86 N. Y. Supp. 98.

2. *German-American Ins. Co. v. Hocking*, 115 Pa. St. 398; *Kelly v. Sun Fire Office*, 141 Pa. St. 10. And see *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537, *affd.*, 39 N. Y. 45; *Kimball v. Hamilton Ins. Co.*, 8 Bosw. 405.

3. *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120; *Insurance Co. of N. A. v. Forwood Cotton Co.*, 13 Ky. L. R. 261; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308. See Rule 4. If insured first refuses to have an appraisal and then subsequently offers to have it, the time may run from the date of his offer. *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. Rep. 1005.

RULE 4.

Time as Affected by Form of Statement or Proofs.

If the statement or proofs furnished substantially comply with the condition in the policy, the time begins to run then, although the statement may be objected to and further proof subsequently furnished.

McNally v. Phoenix Ins. Co., 137 N. Y. 389, 399, 33 N. E. Rep. 475. And see *Manchester Ins. Co. v. Ellis*, 85 Ill. App. 634; *Ehlers v. Aurora Ins. Co.*, 19 Pa. Co. Ct. 165; *Hamilton v. Phoenix Ins. Co.*, 61 Fed. Rep. 379, 9 C. C. A. 530, 23 Ins. L. J. 561. See also *Putze v. Saginaw Valley Ins. Co.*, 132 Mich. 670, 94 N. W. Rep. 191, *revg.* on rehearing previous opinion, 86 N. W. Rep. 814.

RULE 5.

Time not Extended by Requirements of the Company, but May Affect Right to Sue.

The time for payment is not extended by the company making requirements of the assured under those clauses or conditions which become operative only in event of being required;¹ but failure or neglect to comply with such requirements may affect the right to bring or maintain an action upon the policy.²

1. *McAllister v. Niagara Ins. Co.*, 156 N. Y. 80, 50 N. E. Rep. 502; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. Rep. 475. And see *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *Ætna Ins. Co. v. McLead*, 57 Kans. 95, 45 Pac. Rep. 73.

2. See Rule 1.

RULE 6.

Effect of Waiver of Proofs.

If proofs of loss are waived by the insurance company the prescribed period commenced to run from the time of such waiver; and this may be so, notwithstanding the assured afterward furnishes same.

Eggleston v. Council Bluffs Ins. Co., 65 Iowa, 308. And see *Phoenix Ins. Co. v. Center*, 10 Tex. Civ. App. 535.

RULE 7.

Denial of Liability as Waiver.

If the insurance company denies liability the clause in the policy prescribing the sixty days' period before loss becomes due and payable is inoperative; the loss, if any, becomes immediately due and payable, and action may be commenced without waiting the expiration of the sixty days;¹ and this result is not affected by the clause in the policy giving the company an

option to replace,² but it is affected and prevented by a statute which prescribes a specific period of time after notice of loss before any suit can be brought;³ admission of liability and offer to pay in part, and denial of liability as to balance, may also operate as a waiver of the sixty-day limitation,⁴ but not when waiver applies to severable item.⁵

1. *First Baptist Church v. Citizens' Ins. Co.*, 119 Mich. 203, 77 N. W. Rep. 702, 28 Ins. L. J. 165; *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 62 S. W. Rep. 145; *Hosmer v. St. Joseph Ins. Co.*, 80 Mo. App. 419; *Western & A. Pipe Line v. Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. Rep. 665; *Home Ins. Co. v. Fallon*, 45 Nebr. 554, 63 N. W. Rep. 860, 24 Ins. L. J. 690; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453; *Donahue v. Windsor Ins. Co.*, 56 Vt. 374; *Commercial Ins. Co. v. Allen*, 80 Ala. 571; *Cascade Ins. Co. v. Journal Pub. Co.*, 1 Wash. 452, 25 Pac. Rep. 331; *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. Rep. 672; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Cobb v. Insurance Co. of N. A.*, 11 Kan. 93; *California Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. Rep. 577; *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751, 26 Pac. Rep. 410; *Hartford Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. Rep. 685; *Continental Ins. Co. v. Wickham*, 110 Ga. 129, 35 S. E. Rep. 287; *American Central Ins. Co. v. Henninger*, 87 Ill. App. 440; *Northern Assur. Co. v. Hanna*, 60 Nebr. 29, 82 N. W. Rep. 97; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207, 57 N. E. Rep. 991; *Phoenix Ins. Co. v. Luce*, 60 C. C. A. 655, 123 Fed. Rep. 257; *Edwards v. Fireman's Ins. Co.*, 43 Misc. 354, 87 N. Y. Supp. 507; *Frost v. North British & M. Ins. Co.*, Vt., 60 Atl. Rep. 803. And see "Statement or Proof of Loss."

2. *Western Home Ins. Co. v. Richardson*, 40 Nebr. 1, 58 N. W. Rep. 597, 23 Ins. L. J. 501.

3. *Quin v. Capital Ins. Co.*, 71 Iowa, 615, 33 N. W. Rep. 130; *Vore v. Hawkeye Ins. Co.*, 76 Iowa, 548, 41 N. W. Rep. 309; *Taylor v. Merchants' Ins. Co.*, 83 Iowa, 402, 49 N. W. Rep. 994.

4. *Commercial Ins. Co. v. Allen*, 80 Ala. 571, 1 So. Rep. 202; *Baltimore Ins. Co. v. Loney*, 20 Md. 20.

5. *Gillon v. Northern Assur. Co.*, 127 Cal. 480, 59 Pac. Rep. 901. Rule under the Iowa statute. (See Rule 1, note.) *Finster v. Merchants' Ins. Co.*, 97 Iowa, 9, 65 N. W. Rep. 1004; *Blood v. Hawkeye Ins. Co.*, 103 Iowa, 728, 69 N. W. Rep. 1141.

RULE 8.

Demand of Payment not Necessary.

When right of action has accrued under the terms of the policy, or there has been a waiver of conditions precedent to loss becoming due and payable, no demand of payment is necessary before action.

Caledonia Ins. Co. v. Traub, 80 Md. 214, 30 Atl. Rep. 904; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580.

RULE 9.

When Interest Added.

Interest is added to the claim from the time it becomes due and payable, under the terms of the policy;¹ unless liability is denied and proof of loss thereby waived, interest may run from date of the loss or fire;² otherwise it does not begin to run until sixty days after the waiver,³ or in case of a partial loss where the sum is not liquidated until demand is made for its payment;⁴ the rate of interest is subject to change by statute.⁵

1. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. Rep. 425, 24 Ins. L. J. 47; *Phoenix Ins. Co. v. Public Park Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959; *Firemen's Ins. Co. v. Kuessner*, 59 Ill. App. 432, *affd.*, 164 Ill. 276; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 44 N. E. Rep. 209, 25 Ins. L. J. 746; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. Rep. 297; *Reading Ins. Co. v. Egelhoff*, 115 Fed. Rep. 393; *Produce Refrigerating Co. v. Norwich Union Ins. Assoc.*, Minn., 98 N. W. Rep. 100, *affg. on rehearing*, Minn., 97 N. W. Rep. 875. And see Rule 3.

2. *Western & A. Pipe Line v. Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. Rep. 665; *Hartford Ins. Co. v. Landfare*, 63 Nebr. 559, 88 N. W. Rep. 779. And see *Glover v. Rochester German Ins. Co.*, 11 Wash. 143, 39 Pac. Rep. 380.

3. *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713. See Rule 3.

4. *Hutchinson v. Liverpool, L. & G. Ins. Co.*, 153 Mass. 143, 26 N. E. Rep. 439.

5. *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322.

RULE 10.

Effect on Interest of Independent Promise to Pay.

Where the claim under the policy is superseded by an express and independent promise to pay the amount of an adjustment, interest commences to run from the time of the making of such promise.

Home Ins. Co. v. Meyer, 93 Ill. 271.

RULE 11.

Effect of Trustee Process upon Interest.

If the insurance company is prevented from paying the loss by trustee process it cannot be obliged to pay interest from the time it would have originally become due and payable.

Oriental Bank v. Tremont Ins. Co., 4 Metc. (Mass.) 1.

RULE 12.

Claim and Suit Under Lloyds Policy.

A provision in a Lloyds policy that suit must first be brought against the attorney, who is also one of the underwriters, is valid and enforceable and operates as a condition precedent;¹ if no attorney, suit may be against the underwriters² or against his successor.³

1. *Ketchum v. Belding*, 58 App. Div. 295, 68 N. Y. Supp. 1099, affg. 32 Misc. 506, 66 N. Y. Supp. 307; *Leiter v. Beecher*, 2 App. Div. 577, 37 N. Y. Supp. 1114; *Lawrence v. Schafer*, 20 App. Div. 80, 46 N. Y. Supp. 719; *Compton v. Beecher*, 17 App. Div. 38, 44 N. Y. Supp. 887; *New Jersey & Pennsylvania Concentrating Works v. Ackerman*, 6 App. Div. 540, 39 N. Y. Supp. 585; *Enterprise Lumber Co. v. Munday*, 62 N. J. L. 16, 42 Atl. Rep. 1063; *Perrysburg & L. Co. v. Gilchrist*, 24 Ohio Cir. 165. And see *Burke v. Rhoads*, 82 App. Div. 325, 81 N. Y. Supp. 1045.

2. *American Lucol Co. v. Lowe*, 41 App. Div. 500, 58 N. Y. Supp. 687.

3. *Wheelock v. Chapman*, 34 App. Div. 464, 54 N. Y. Supp. 327; *American Lucol Co. v. Lowe*, 41 App. Div. 500, 58 N. Y. Supp. 687. And see *Gough v. Satterlee*, 32 App. Div. 33, 37, 52 N. Y. Supp. 492; *McCready v. Thrush*, 37 App. Div. 465, 56 N. Y. Supp. 68.

Under the Wisconsin statute all insurance companies interested in a loss may be joined as parties defendant in one action. *Dick v. Equitable Ins. Co.*, 92 Wis. 46, 65 N. W. Rep. 742, 25 Ins. L. J. 449; *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656, 66 N. W. Rep. 712, 25 Ins. L. J. 631.

RULE 13.

Several Claims Under Same Policy.

Several claims due under the same policy constitute a single demand which cannot be split and separate suits maintained for each without the consent of the company.

Pettit v. American Central Ins. Co., 69 Mo. App. 317.

RULE 14.

Penalty on Refusing Payment.

The penalty imposed by a statute on an insurance company, if it vexatiously refuses to pay a loss, by adding 10 per cent. to amount of loss, is justified only where the refusal to pay was without reasonable cause; if company acts in good faith, on reasonable ground, it is not subject to the penalty. This is not determined by the result at the trial but by appearances before the trial to a prudent and reasonable man.

Blackwell v. American Central Ins. Co., 80 Mo. App. 75.

Under the decision of the U. S. Supreme Court in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, it is doubtful whether such statutory penalties are constitutional and valid. And see the cases cited in the opinions in that case.

CHAPTER EIGHTH.**Subrogation.**

- RULE**
1. Right of subrogation as created by contract.
 2. Right exists independent of contract.
 3. Insurance company may demand assignment when it pays.
 4. Depends upon right or claim of the insured.
 5. Immaterial whether insured's claim exists at common law or under statute.
 6. Right of insurance company to be put into place of insured — Limitation.
 7. Right of foreign insurance company not affected by its failure to comply with State laws.
 8. Subrogation to claim of insured as against railroad or transportation company — Interest.
 9. Same subject — Rights of insured — Effect of first collecting entire loss from the railroad company — Concealment.
 10. Settlement with insured by railroad company not conclusive as to its liability.
 11. The insurance or its payment no defense for the railroad company.
 12. Effect of general release by insured to railroad company.
 13. Contributory negligence of insured a defense — Question of fact.
 14. Legal right of insured to place his property in proximity to tracks.
 15. Effect of settlement by insured with railroad company before payment of insurance.
 16. Effect of release excepting or reserving the insurance — Right of insurance company to demand assignment.
 17. Effect of stipulations in a bill of lading.
 18. Right of subrogation does not depend upon a written assignment — Effect of statute or codes of practice and right of insurance company to sue in own name.
 19. When insurance companies may sue in their own names — Parties to such suit.
 20. Distinction in practice at common law, in equity, and under codes of procedure — Insured a trustee — Effect of release.

- RULE 21. Insurance company not obliged to sue in State where fire occurred.
22. Proper practice when loss exceeds the insurance.
 23. Effect of action by insured against railroad company after payment of the insurance—Rights of insured and the insurance company in judgment and proceedings.
 24. Effect of insured preventing or defeating subrogation by his agreement with party responsible for loss.
 25. Same subject—Effect of concealment by insured.
 26. Subrogation to claim of a mortgagee—Effect of mortgagee clause.
 27. Same subject—Forfeiture of policy as to owner and insured not assumed—Must be proved.
 28. Right of insurance company assignable.
 29. Mortgagee has right to foreclose—Insurance company must be prompt in protection of its interests.
 30. Mortgagee's right to settle with other companies.
 31. Effect of delay by the insurance company in obtaining assignment of mortgage—What tender must include.
 32. Mortgage must be paid or tendered in full.
 33. Insurance company may be bound to credit on the mortgage as against previous owner liable for deficiency.
 34. Effect of independent insurance by the mortgagee upon his interest.
 35. Effect of making loss payable to the mortgagee without mortgagee clause.
 36. When no mortgagee clause and owner or mortgagor as between himself and mortgagee entitled to benefit of insurance—Owner in default.
 37. Mortgagor may be subrogated to rights of mortgagee in insurance.
 38. Sureties may be subrogated to claim of mortgagee.
 39. Effect of owner and mortgagee preventing or destroying right of subrogation.
 40. Subrogation to claim of a vendor under executory contract of sale.
 41. Effect of a vendee taking an assignment of a mortgagee's interest under the mortgagee clause.
 42. Effect of insurance for joint benefit of vendor and vendee.

RULE 1.**Right of Subrogation as Created by Contract.**

If the insurance company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, the company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured on receiving such payment.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

By the standard form of policy prescribed in:

Maine,
Massachusetts,

Minnesota,
New Hampshire,

it is provided that "whenever the company shall pay any loss the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company."

The South Dakota form provides: "If this company shall claim that the fire was caused by the act or neglect of any third person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for loss resulting therefrom and such rights shall be assigned to this company by the insured on receiving such payment."

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

RULE 2.**Right Exists Independent of Contract.**

Where loss is caused by third party liable to the assured, an insurance company paying such loss is entitled to subrogation, whether stipulated in the policy or not.

Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. Rep. 562. And see *Indiana Natural Gas Co. v. New Hampshire Ins. Co.*, 23 Ind. App. 298, 53 N. E. Rep. 485.

RULE 3.**Insurance Company May Demand Assignment when it Pays.**

Where the policy provides in terms that the assured shall assign his claim against a wrongdoer (see Rule 1) the insurance company may demand such assignment when it pays the loss, and if refused it may be a defense to an action on the policy;¹ and so in case of a mortgagee when the insurance company is entitled to subrogation.²

1. *Niagara Ins. Co. v. Fidelity Co.*, 123 Pa. St. 516, 16 Atl. Rep. 790; *Insurance Co. of N. A. v. Fidelity Co.*, 123 Pa. St. 523; *Southard v. Minneapolis & St. P. R. Co.*, 60 Minn. 382, 62 N. W. Rep. 442.

2. *Dick v. Franklin Ins. Co.*, 81 Mo. 103, affg. 10 Mo. App. 376.

RULE 4.**Depends upon Right or Claim of the Insured.**

If the insured had or has no right or claim against the wrongdoer the insurance company acquires none by subrogation.

Phoenix Ins. Co. v. Trenton Water Co., 42 Mo. App. 118; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. Rep. 562.

RULE 5.

Immaterial Whether Insured's Claim Exists at Common Law or Under Statute.

The right of an insurance company, upon payment of a loss, to subrogation to claim of the insured against the wrongdoer causing it exists and is enforceable, whether the claim of the assured exists at common law or under a statute.

Crissey & Fowler Lumber Co. v. Denver & Rio Grande R. Co.,
17 Colo. 275, 68 Pac. Rep. 670.

RULE 6.

Right of Insurance Company to be Put Into Place of Insured — Limitation.

A policy of fire insurance is a contract of indemnity, and upon payment of the amount of the loss the insurer is entitled to be put into the place of the assured, and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him;¹ but this rule does not extend to a case where the assured's claim arises under a contract with one who was not connected with the loss or responsible for it.²

1. *Darrall v. Tibbitts*, L. R., 5 Q. B. 560. And see *Kernochan v. New York Bowery Ins. Co.*, 5 Duer, 1, 5.

2. *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. Rep. 810, affg. 64 App. Div. 182, 71 N. Y. Supp. 918, citing *Foley v. Manufacturers & Builders' Ins. Co.*, 152 N. Y. 131. And see "Amount of Loss or Damage," Rule 34.

RULE 7.

Right of Foreign Insurance Company not Affected by its Failure to Comply with State Laws.

The failure of a foreign insurance company to comply with statutory requirements as a condition of transacting business within the State does not affect its right to subrogation upon voluntary payment of a loss to a citizen of that State, nor its legal right to enforce the same.

Phoenix Ins. Co. *v.* Pennsylvania Co., 134 Ind. 215, 33 N. E. Rep. 970; Lumbermen's Ins. Co. *v.* Kansas City, F. S. & M. R. Co., 149 Mo. 165, 50 S. W. Rep. 281, 28 Ins. L. J. 594; St. Louis, Ark. & Tex. R. Co. *v.* Fire Assoc., 60 Ark. 325, 30 S. W. Rep. 350.

RULE 8.

Subrogation to Claim of Insured as Against Railroad or Transportation Company — Interest.

An insurance company, on payment of a loss caused by negligence of a railroad or transportation company or other wrongdoer, becomes subrogated to rights of the insured as against the railroad company or wrongdoer to extent of amount so paid;¹ when voluntarily paid the railroad company cannot defend on ground that the insurance company was not legally bound;² interest runs from time of payment,³ but its allowance is discretionary with a jury.⁴

1. Chicago & Alton R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. Rep. 896, affg. 70 Ill. App. 510; St. Louis, I. M. & S. R. Co. *v.* Commercial Union Assur. Co., 139 U. S. 223, 11 Sup. Ct. Rep. 554; Norwich Union Ins. Co. *v.* Standard Oil Co., 59 Fed. Rep. 984, 8 C. C. A. 433, 19 U. S. App. 460; Hall *v.* Railroad Cos., 13 Wall. (U. S.) 367; Atchison, Topeka & S. F. R. Co. *v.* Neet, 7 Kans. App. 495, 54 Pac. Rep. 134; Wunderlich *v.* Chicago N. R. Co., 93 Wis. 132, 66 N. W. Rep. 1144; Hous-

ton Direct Nav. Co. *v.* Insurance Co. of N. A. (Tex.), 31 S. W. Rep. 560; *Deming v. Merchants' Cotton-Press Co.*, 90 Tenn. 306, 17 S. W. Rep. 89; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 643; *Wager v. Provident Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. Rep. 55; *Holcomb v. Richmond R. Co.*, 78 Ga. 776; *Huntisford Ins. Co. v. Railroad Co.*, 66 Wis. 58; *Stoughton v. Manufacturers' Gas Co.*, 165 Pa. St. 428; *Central Vermont R. Co. v. Stanstead*, Rap. Jud. Quebec (1896), 5 B. R. 224.

2. *St. Louis, Ark. & T. R. Co. v. Fire Assoc.*, 60 Ark. 325, 30 S. W. Rep. 350; *King v. Victoria Ins. Co.*, L. R. P. C. (1896) A. C. 250.

3. *Texarkana & F. S. R. Co. v. Hartford Ins. Co.* (Tex.), 44 S. W. Rep. 533.

4. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182.

Exceptions.—In Maine, by effect of statute (1895), the railroad company is liable only for the *difference* between the net amount of insurance recovered and the amount of the injury suffered by the property-owner. As the insurance companies cannot acquire any claim or right by subrogation which assured does not have, the rights of the insurance company are materially affected by the statute; but it cannot be said to affect its contractual rights nor is such a statute unconstitutional. *Leavitt v. Canadian Pacific R. Co.*, 90 Me. 153, 37 Atl. Rep. 886. The Maine statute does not relieve the railroad company from the consequences of its own negligence, though it may affect or limit the measure of damage or recovery. *Dyer v. Maine Central Ry. Co.*, Me. , 58 Atl. Rep. 994. And in Colorado a late statute (1903) materially affects right of subrogation. See statutes in chapter twelfth.

RULE 9.

Same Subject — Rights of Insured — Effect of First Collecting Entire Loss from the Railroad Company — Concealment.

When loss is caused by negligence of a railroad company the insured has the primary right to indemnity against either the railroad company or the insurance company, and can collect of either; but if he first collect from the railroad company the entire amount of his loss he cannot have a second satisfaction of the insurance company; and if he first collects the insurance, then he becomes a trustee in equity to the extent

of the amount thus collected, and the insurance company is subrogated to the rights of the assured as against the wrongdoer;¹ if, after being paid in full by the railroad company, he conceals the fact and collects from the insurance company, latter may recover back the amount so paid upon the ground that it was fraudulently obtained.²

1. *Chicago, Burlington & Q. R. Co. v. Emmons*, 42 Ill. App. 138; *Chicago, St. L. & N. O. R. Co. v. Pullman Co.*, 139 U. S. 79; *Chickasaw County Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. Rep. 443; *Kennedy v. Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. Rep. 831; *Hart v. Western R. Co.*, 13 Metc. (Mass.) 99; *Connecticut Ins. Co. v. Erie R. Co.*, 73 N. Y. 399. And see *Niagara Ins. Co. v. Fidelity Co.*, 123 Pa. St. 516; *Pentz v. Aetna Ins. Co.*, 3 Edw. Ch. 341; *Hartford Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106; *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

2. *Chickasaw County Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. Rep. 443, and preceding cases.

RULE 10.

Settlement with Insured by Railroad Company not Conclusive as to its Liability.

The fact that a railroad company compromised and settled with the insured is not conclusive as to its liability in a suit subsequently brought by the insurance company on account of the same loss.

Home Ins. Co. v. Atchison, Topeka & S. F. R. Co., 4 Kans. App. 60, 46 Pac. Rep. 179.

RULE 11.

The Insurance or its Payment no Defense for the Railroad Company.

The railroad company or other wrongdoer cannot claim the benefit or deduction of the insurance moneys;

it is no defense for the wrongdoer that his victim has hired a stranger to indemnify him, and has either collected a part or all of the indemnity promised.

Missouri, K. & T. R. Co. v. Fuller, 72 Fed. Rep. 467, 18 C. C. A. 641, 36 U. S. App. 456; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584; *Texas & Pacific R. Co. v. Levi*, 59 Tex. 674; *Cunningham v. Evansville & T. R. Co.*, 102 Ind. 478; *Chicago, St. L. & N. R. Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Harding v. Town*, 43 Vt. 536; *Regan v. New York & N. E. R. Co.*, 60 Conn. 124, 22 Atl. Rep. 503; *Collins v. Railroad Co.*, 5 Hun, 503; *Webber v. Morris & E. R. Co.*, 35 N. J. L. 409; *Sloughton v. Manufacturers' Gas Co.*, 165 Pa. St. 428, 30 Atl. Rep. 1001; *St. Louis R. Co. v. Fire Assoc.*, 60 Ark. 325, 30 S. W. Rep. 350; *Hart v. Western R. Co.*, 13 Metc. (Mass.) 99.

RULE 12.

Effect of General Release by Insured to Railroad Company.

A general release obtained by the railroad company from the insured is void as against the claim of the insurance company, the latter being regarded as an assignee in equity upon payment of the loss.

Chicago, B. & Q. R. Co. v. Emmons, 42 Ill. App. 138; *Hartford Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106; *West of England Ins. Co. v. Isaacs*, (1897) 1 Q. B. 226, affg. (1896) 2 Q. B. 377. And see *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Brighthope R. Co. v. Rogers*, 76 Va. 443. See also Rules 9, 15.

RULE 13.

Contributory Negligence of Insured a Defense — Question of Fact.

While the owner's contributory negligence may defeat the insurance company's claim against the railroad company the question is usually one of fact for a jury.

Wild v. Boston & Maine R. Co., 171 Mass. 245, 50 N. E. Rep. 533; *Liverpool, L. & G. Ins. Co. v. Southern Pacific R. Co.*, 125 Cal. 434, 58 Pac. Rep. 55.

RULE 14.

Legal Right of Insured to Place His Property in Proximity to Tracks.

Owner and insured is not guilty of contributory negligence as matter of law in building or placing property upon his own land in proximity to railroad tracks, as he has the right to assume that the railroad company will use proper care to avoid firing his property.

St. Louis & L. W. R. Co. v. Miller, 27 Tex. Civ. App. 344, 66 S. W. Rep. 139.

RULE 15.

Effect of Settlement by Insured with Railroad Company Before Payment of Insurance.

Where the assured settles with the railroad company or wrongdoer causing the loss, and gives it a general and full release without excepting the insurance, thus depriving the insurance company of its right of subrogation in case it should make payment, it is a good defense to a subsequent action to recover the insurance;¹ or if the insurance be subsequently paid the insurance company takes nothing by subrogation or assignment.²

1. *Sims v. Mutual Ins. Co.*, 101 Wis. 586, 77 N. W. Rep. 908; *Niagara Ins. Co. v. Fidelity Co.*, 123 Pa. St. 516, 16 Atl. Rep. 790. And see *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. Rep. 562.

2. *Home Ins. Co. v. Atchison, Topeka & S. F. R. Co.*, 19 Colo. 46, 34 Pac. Rep. 281. And see Rule 4.

RULE 16.

Effect of Release Excepting or Reserving the Insurance — Right of Insurance Company to Demand Assignment.

Where the assured settles with the railroad company causing the loss, and gives it a general and full release, excepting or reserving the insurance, which is subsequently paid, the insurance company is subrogated to the assured's claim as against the railroad company as to amount so paid, and the railroad company cannot set up the release as a defense, nor can it defend upon the ground that there has been a splitting of the cause of action by the assured;¹ but the insurance company cannot demand an assignment in advance of payment of the insurance unless the policy in terms requires such assignment.²

1. *Atchison, Topeka & S. F. R. Co. v. Home Ins. Co.*, 59 Kans. 432, 53 Pac. Rep. 459, 27 Ins. L. J. 790. And see *Connecticut Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *People's Natural Gas Co. v. Fidelity Trust Co.*, 150 Pa. St. 8, 24 Atl. Rep. 339; *Insurance Co. of N. A. v. Fidelity Trust Co.*, 123 Pa. St. 523, 16 Atl. Rep. 791; *Thomas v. Montauk Ins. Co.*, 43 Hun, 218.

2. *Insurance Co. of N. A. v. Fidelity Trust Co.*, 123 Pa. St. 523, 16 Atl. Rep. 791; *Niagara Ins. Co. v. Fidelity Trust Co.*, 123 Pa. St. 516, 16 Atl. Rep. 790.

RULE 17.

Effect of Stipulations in a Bill of Lading.

An insurance company's rights acquired by subrogation on payment of a loss to property in possession of a railroad company, under a bill of lading, is subject to any defense which might have been made thereunder by the railroad company as against the assured; hence a stipulation in the bill requiring claim to be

made and suit to be brought within a specified limited time is reasonable and enforceable, and if not complied with will defeat the insurance company's action; when the bill of lading also provides that the railroad company shall have the benefit of any insurance by or for account of the owner of the goods, no cause of action accrues by subrogation or can be assigned to the insurance company against the common carrier or railroad company.

North British & M. Ins. Co. v. Central Vermont R. Co., 9 App. Div. 4, 40 N. Y. Supp. 1113, *affd.* without opinion, 158 N. Y. 726; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. Rep. 55, 23 Ins. L. J. 273.

RULE 18.

Right of Subrogation Does not Depend upon a Written Assignment — Effect of Statute or Codes of Practice and Right of Insurance Company to Sue in Own Name.

The rights acquired by subrogation do not depend upon a written assignment of the claim; upon payment of the insurance the insurance company is regarded as an assignee in equity;¹ where a statute or modern code of practice does not permit suit in name of insurance company, a written assignment or authority may be necessary for purpose of suit,² and should extend to the whole claim of the insured, either as affecting the measure of damage³ or to avoid splitting the cause of action.⁴

1. *Chicago, B. & Q. R. Co. v. Emmons*, 42 Ill. App. 138; *Hamburg-Bremen Ins. Co. v. Atlantic Coast Line*, 132 N. C. 75, 43 S. E. Rep. 548; *St. Louis, Ark. & T. R. Co. v. Fire Assoc.*, 60 Ark. 325, 30 S. W. Rep. 350, 55 Ark. 163, 18 S. W. Rep. 43; *Sims v. Mutual Ins. Co.*, 101 Wis. 586, 77 N. W. Rep.

908; *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625, 6 N. W. Rep. 314; *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. Rep. 619; *People's Natural Gas Co. v. Fidelity Trust Co.*, 150 Pa. St. 8, 24 Atl. Rep. 339; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653; *Hart v. Western R. Co.*, 13 Metc. (Mass.) 99; *Lumbermen's Ins. Co. v. Kansas R. Co.*, 149 Mo. 165; *Farmers' Ins. Co. v. Johnston*, 113 Mich. 426; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213; *Packham v. German Ins. Co.*, 91 Md. 515, 46 Atl. Rep. 1066; *Lake Erie & W. R. Co. v. Falk*, 62 Ohio St. 297, 56 N. E. Rep. 1020. And see *Quebec Assur. Co. v. St. Louis*, 7 Moore P. C. 286.

2. *King v. Victoria Ins. Co.*, L. R. P. C. (1896) A. C. 250. But see Rule 20.

3. *Hustisford v. Chicago, M. & St. P. R. Co.*, 66 Wis. 58.

4. See Rules 19 and 20.

RULE 19.

When Insurance Companies May Sue in their Own Names— Parties to Such Suit.

When a statute or code of practice authorizes suit in name of real party in interest, and a number of insurance companies are subrogated as equitable assignees to rights of insured as against a railroad company, they may properly be joined as plaintiffs in an action against the latter to recover the loss or damage. If the assured has any interest or his whole loss was not paid by the insurance companies he should be also joined as a party to the action, either as a plaintiff by his consent or as defendant if he refuses. There is but one claim and that is the assured's; it is an indivisible tort;¹ if the insured sues, the insurance companies may be necessary parties to the action,² and may intervene in protection of their interests.³

1. *Mobile Ins. Co. v. Columbia R. Co.*, 41 S. C. 408, 19 S. E. Rep. 858; *Wunderlich v. Chicago & N. W. R. Co.*, 93

Wis. 132, 66 N. W. Rep. 1144; *Swarthout v. Chicago & N. R. Co.*, 49 Wis. 625, 6 N. W. Rep. 314; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. Rep. 606; *Atchison, Topeka & S. F. R. Co. v. Neet*, 7 Kans. App. 495, 54 Pac. Rep. 134; *Chicago, St. L. & N. R. Co. v. Pullman Car Co.*, 139 U. S. 79; *Fairbanks v. San Francisco & N. P. R. Co.*, 115 Cal. 579, 47 Pac. Rep. 450; *Omaha & R. R. Co. v. Granite State Ins. Co.*, 53 Nebr. 514, 73 N. W. Rep. 950; *State Ins. Co. v. Oregon Nav. Co.*, 20 Oreg. 563, 26 Pac. Rep. 838; *Home Ins. Co. v. Oregon Nav. Co.*, 20 Oreg. 569, 26 Pac. Rep. 857. And see *Continental Ins. Co. v. Loud Lumber Co.*, 93 Mich. 139; *Atchison, Topeka & S. F. R. Co. v. Home Ins. Co.*, 59 Kans. 432; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 643; *St. Louis & S. W. R. Co. v. Miller*, 31 Tex. Civ. App. 104, 66 S. W. Rep. 139 (rehearing and writ of error denied); *Philadelphia Underwriters v. Fort Worth & D. C. R. Co.*, Tex. Civ. App., 71 S. W. Rep. 419.

2. *Munson v. New York Cent. & H. R. R. Co.*, 32 Misc. 282, 65 N. Y. Supp. 848; *Lake Erie & W. R. Co. v. Falk*, 62 Ohio St. 297, 56 N. E. Rep. 1020.

3. *Id.*

It was held in *Springfield F. & M. Ins. Co. v. Richmond & Danville R. Co.*, 48 Fed. Rep. 360, that the provisions of the South Carolina Code of Civil Procedure as to bringing in parties and making a party defendant when consent cannot be obtained as party plaintiff, have no application to an action at law in a Federal court.

RULE 20.

Distinction in Practice at Common Law, in Equity, and Under Codes of Procedure — Insured a Trustee — Effect of Release.

The right of the insurance company is derived from the insured alone and can be enforced in his right only. At common law it must be asserted in name of the insured. In a court of equity or admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name when it has paid the insured the full value of the property insured. But when the value of the property exceeds the insurance money paid, at common law, suit must be brought

in name of the insured. In such an action the full value may be recovered, the insured becoming a trustee as to the amount paid him by the insurance company; and the defendant is not permitted to plead a release from the insured or payment by the insurance company;¹ a release by the insured may be good as between him and the railroad company, and in that case he need not be joined as a party to the action;² when necessary to sue in insured's name the insurance company may do so without the former's consent.³

1. *Norwich Union Ins. Co. v. Standard Oil Co.*, 59 Fed. Rep. 984, 8 C. C. A. 433, 19 U. S. App. 460; *Southern Bell Tel. Co. v. Watts*, 66 Fed. Rep. 460, 13 C. C. A. 579; *Chicago, B. & Q. R. Co. v. Emmons*, 42 Ill. App. 138; *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. Rep. 619; *Wager v. Provident Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. Rep. 55; *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. Rep. 615; *St. Louis, T. & A. R. Co. v. Fire Assoc.*, 60 Ark. 325, 30 S. W. Rep. 350. And see *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Connecticut Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Pratt v. Radford*, 52 Wis. 114; *Mobile Ins. Co. v. Columbia R. Co.*, 41 S. C. 408, 19 S. E. Rep. 858; *Holcombe v. Richmond R. Co.*, 78 Ga. 776, 3 S. E. Rep. 755. See also Rules 12 and 19.

2. *Hartford Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106.

3. *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

RULE 21.

Insurance Company not Obligated to Sue in State where Fire Occurred.

The insurance company which has acquired a claim by subrogation against a railroad company is not obliged to institute a suit in the State where the fire occurred; it may sustain an action in the State where it has its home office or principal place of business, provided, of course, that jurisdiction is otherwise ob-

tained by proper and sufficient service of process upon the defendant. The cause of action is transitory.

Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182.

RULE 22.

Proper Practice when Loss Exceeds the Insurance.

When the loss to assured exceeds the amount of insurance received it is proper for the insurance companies and the assured to make an agreement for the proper prosecution of the claim, and division of the proceeds when collected.

Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., 139 U. S. 79.

RULE 23.

Effect of Action by Insured Against Railroad Company After Payment of the Insurance — Rights of Insured and the Insurance Company in Judgment and Proceedings.

When the assured, after payment by insurance companies, brings suit against the railroad company causing the loss, the verdict and judgment presumptively represent the *whole loss*; in the absence of evidence rebutting such presumption insured is entitled to retain only the amount of the judgment in excess of what he received from the insurance company;¹ he stands as a trustee as to any surplus which may remain in his hands after satisfying his own excess of loss in full and his reasonable costs and expenses incurred in its recovery unless the insurance companies on notice and opportunity have contributed to and made common cause with him; if he makes an agreement to prosecute for joint benefit and fraudulently has case dismissed

he is liable in suit at instance of the insurance companies;² he cannot give a release to prejudice of the insurance companies;³ and if the insured is insolvent the insurance companies may obtain relief by bill and injunction, restraining settlement of his case against the railroad company,⁴ but otherwise he may continue his action.⁵

1. *Stoughton v. Manufacturers' Natural Gas Co.*, 165 Pa. St. 428, 30 Atl. Rep. 1001; *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409; *West of England Ins. Co. v. Isaacs*, (1897) 1 Q. B. 226, affg. (1896) 2 Q. B. 377; *National Ins. Co. v. McLaren*, 12 Ont. 682 (a well-written opinion from which no appeal was taken).

2. *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382; *Svea Ins. Co. v. Packham*, 92 Md. 464, 48 Atl. Rep. 359; *National Ins. Co. v. McLaren*, 12 Ont. 682; *Ætna Ins. Co. v. Confer*, 158 Pa. St. 598, 28 Atl. Rep. 153.

3. *West of England Ins. Co. v. Isaacs*, (1897) 1 Q. B. 226, affg. (1896) 2 Q. B. 377.

4. *Hartford Ins. Co. v. Pennell*, 2 Ill. App. 609.

5. *Nichols v. Chicago, St. P. & M. R. Co.*, 36 Minn. 452, 32 N. W. Rep. 176.

RULE 24.

Effect of Insured Preventing or Defeating Subrogation by His Agreement with Party Responsible for Loss.

The assured defeats and prevents subrogation as against a railroad or transportation company, or party liable for the loss, when he has by stipulation or agreement in the bill of lading or otherwise agreed to give such party the benefit of the insurance,¹ or has released the party from liability for the loss;² and when he has thus or otherwise by his own act or contract deprived the insurance company of its right to subrogation reserved in the policy, it is a good defense to his action on the policy,³ specially when the policy contains a

special clause or provision in effect that the assured shall do no act affecting subrogation, or releasing the carrier or party responsible for any loss, or giving it or him the benefit of the insurance;⁴ but it is no defense when the assured was ignorant of the clause in a bill of lading affecting subrogation and acted in good faith, and there is no provision or limitation in the policy as to subrogation or terms of the carrier's contract;⁵ nor is it a defense necessarily when the value of the property is limited in the bill of lading.⁶

1. *Platt v. Richmond & C. R. Co.*, 108 N. Y. 358; *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312; *Providence-Washington Ins. Co. v. Sidney*, 23 Fed. Rep. 88; *British Ins. Co. v. Gulf, C. & F. R. Co.*, 63 Tex. 475; *Rintoul v. New York Cent. R. Co.*, 21 Blatchf. 439, 17 Fed. Rep. 905, 20 Fed. Rep. 313. And see *Inman v. South Carolina R. Co.*, 129 U. S. 128; *Jackson v. Boylston Ins. Co.*, 139 Mass. 508; *Deming v. Merchants' Ins. Co.*, 90 Tenn. 306. See also *McAdams v. Missouri, K. & T. R. Co.*, 19 Tex. Civ. App. 82, 45 S. W. Rep. 936; *Dundee Chemical Works v. New York Mut. Ins. Co.*, 12 Misc. 353, 33 N. Y. Supp. 628.

2. *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. Rep. 562; *Highlands v. Cumberland Valley Ins. Co.*, 203 Pa. St. 134, 52 Atl. Rep. 130. And see *Liverpool, L. & G. Ins. Co. v. McNeill*, 89 Fed. Rep. 131, 59 U. S. App. 499.

[Attention is called to the fact that the liability of the carrier or railroad company for its *negligence*, notwithstanding the contract, may be governed by different rules in the Federal and State courts. The subject is not further considered here as it is beyond the scope of this work.]

3. *Carstairs v. Mechanics & Traders' Ins. Co.*, 18 Fed. Rep. 473; *Kennedy v. Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. Rep. 831; *Niagara Ins. Co. v. Fidelity Trust Co.*, 123 Pa. St. 516; *Seymour v. Tradesmen's Trust Co.*, 203 Pa. St. 151, 52 Atl. Rep. 125; *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Packham v. German Ins. Co.*, 91 Md. 515, 46 Atl. Rep. 1066 (otherwise when by special provision in the policy insured may release the railroad company); *St. Paul Ins. Co. v. Kidd*, 55 Fed. Rep. 238, 22 Ins. L. J. 457, 603.

4. *Insurance Co. of N. A. v. Easton*, 73 Tex. 167, 11 S. W. Rep. 180; *Gulf C. & S. R. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. Rep. 239; *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324, 23 N. E. Rep. 192; *Southard v. Minneapolis, St. P. & S. R. Co.*, 60 Minn. 382, 391, 62 N. W. Rep. 442; *Phoenix Ins. Co. v. Parsons*, 56 N. Y. Super. 424, *affd.*, 129 N. Y. 86, 94, 29 N. E. Rep. 87; *Dundee Chemical Works v. New York Mut. Ins. Co.*, 12 Misc. 353, 33 N. Y. Supp. 628; *Bloomingtondale v. Columbia Ins. Co.*, 84 N. Y. Supp. 572 (App. T.).
5. *Jackson v. Boylston Ins. Co.*, 139 Mass. 508.
6. *Kidd v. Greenwich Ins. Co.*, 35 Fed. Rep. 351.

RULE 25.

Same Subject — Effect of Concealment by Insured.

Where insured at time of obtaining policy had released a railroad from liability on account of fire, and withholds the information from the insurance company, the materiality of this as a concealment may be submitted to a jury as one of fact.

Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 41 Fed. Rep. 271.

RULE 26.

Subrogation to Claim of a Mortgagee — Effect of Mortgagee Clause.

When policy insures owner and mortgagor with loss payable to the mortgagee, with mortgagee clause attached, and the insurance is void as to the owner, upon payment of the loss to the mortgagee the insurance company is entitled to subrogation, and as assignee of the mortgage may foreclose it.

Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389. And see *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141; *Ulster County Institution v. Leake*, 73 N. Y. 161; *Allen v. Watertown Ins. Co.*, 132 Mass. 480; *Sterling Ins. Co. v. Beffrey*, 48 Minn. 91,

50 N. W. Rep. 922; *Traders' Ins. Co. v. Race*, 31 Ill. App. 625, *affd.*, 142 Ill. 338.

In Massachusetts there can be no subrogation to rights of a mortgagee as against the mortgagor, unless the policy or contract in terms provides for it. *Suffolk Ins. Co. v. Boyden*, 9 Allen (Mass.), 123; *Graves v. Hampden Ins. Co.*, 10 Allen (Mass.), 28; *King v. State Ins. Co.*, 7 Cush. (Mass.) 1.

It was held in *Boston Safe-Deposit Co. v. Thomas*, 59 Kans. 470, 53 Pac. Rep. 472, that where an insurance agent had paid the premium he was subrogated to rights of the insurance company, under the mortgagee clause, and might maintain action in his own name to recover the amount of the premium advanced.

RULE 27.

Same Subject — Forfeiture of Policy as to Owner and Insured not Assumed — Must be Proved.

The "mortgagee clause" is valid even though the owner and assured does not know of it, and is contained in a separate paper or agreement with the mortgagee. As to the owner in such case subrogation can arise only as a right given by law upon facts proved, and a forfeiture in fact of the policy as against him is the legal prerequisite to any independent insurance of the mortgagee, and must be proved as one of the issues, which the owner and those claiming under him may require to be proved. If the policy was not in fact forfeited as to the owner at time of payment then the payment to the mortgagee must be considered as a payment to the mortgagee as an appointee of the owner and not under the independent contract, and the owner would be entitled to have the payment credited on the mortgage debt;¹ the right to subrogation depends upon whether the policy has been legally forfeited and not upon the company's mere naked claim that it is not liable;² foreclosure of the mortgage

may be stayed until determination of the insurance company's liability in an action at law on the policy.³

1. *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. Rep. 445. And see *Alamo Ins. Co. v. Davis*, 25 Tex. Civ. App. 342, 60 S. W. Rep. 802; *Sterling Ins. Co. v. Beffrey*, 48 Minn. 9, 50 N. W. Rep. 922; *Wisconsin National Loan Assoc. v. Webster*, 119 Wis. 476, 97 N. W. Rep. 171.

2. *Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. Rep. 392, 29 N. E. Rep. 846.

3. *Race v. Traders' Ins. Co.*, 31 Ill. App. 625. See Rule 29.

RULE 28.

Right of Insurance Company Assignable.

Where a company has paid the insurance to a mortgagee, under the mortgagee clause, policy being void as to the owner, the right thus acquired by subrogation, if any, is assignable by the insurance company and may be enforceable against the proceeds of the mortgage sale.

Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. Rep. 445.

RULE 29.

Mortgagee Has Right to Foreclose — Insurance Company Must be Prompt in Protection of its Interests.

Where the insurance is void as to the owner, as against the mortgagee, under the mortgagee clause, the insurance company cannot claim that the right of subrogation has been impaired or lost by a foreclosure and sale, and that, therefore, he cannot recover for the loss. If foreclosure proceedings are pending at time of fire the insurance company should take active steps and protect its interests, if any, by paying the mortgage debt and taking an assignment or otherwise.

Eddy v. London Assur. Co., 143 N. Y. 311, 38 N. E. Rep. 307, 24 Ins. L. J. 1, affg. 65 Hun, 307, 20 N. Y. Supp. 216.

RULE 30.**Mortgagee's Right to Settle with Other Companies.**

If an insurance company desires to avail itself of a right of subrogation reserved to it under the terms of a mortgagee clause, and to acquire an interest in the mortgage, so as to be able to dictate or control settlement with other companies, it must first pay the amount due from it on account of the loss; until such payment is made the mortgagee is free to make any settlement he desires with other companies.

New Hampshire Ins. Co. v. National Life Ins. Co., 112 Fed. Rep. 199, 50 C. C. A. 188.

RULE 31.**Effect of Delay by the Insurance Company in Obtaining Assignment of Mortgage — What Tender Must Include.**

The insurance company may lose its right to subrogation of the mortgage by delay in making tender or payment; the mortgagee's right to recover under the policy cannot be defeated where liability has been denied by a tender after suit is brought; a tender by the insurance company to secure an assignment of the mortgage must be within reasonable time and include what the mortgagee may have expended in preserving the property and security from further loss.

Elliot Savings Bank v. Commercial Union Assur. Co., 142 Mass. 142, 7 N. E. Rep. 550.

RULE 32.**Mortgage Must be Paid or Tendered in Full.**

Where the insurance is not sufficient to cover the mortgage debt, the company takes nothing by subro-

gation and assignment until the mortgage is paid or tendered in full, both principal and interest.

Phoenix Ins. Co. v. First Nat. Bank, 85 Va. 765, 8 S. E. Rep. 719; *Gibb v. Philadelphia Ins. Co.*, 59 Minn. 267. And see *New England Ins. Co. v. Wetmore*, 32 Ill. 221; *Allen v. Watertown Ins. Co.*, 132 Mass. 480.

RULE 33.

Insurance Company May be Bound to Credit on the Mortgage as Against Previous Owner Liable for Deficiency.

Where company has, pursuant to a mortgagee clause, paid the full amount of the mortgage and taken an assignment of it upon foreclosure of the same, it is bound only to credit upon the mortgage, as against a previous owner liable for any deficiency, the portion of the loss for which it was originally liable to the owner at time of the fire, under the apportionment clause of the policy.

Phoenix Ins. Co. v. Floyd, 19 Hun, 287, *affd.* without opinion. 83 N. Y. 613. And see *Hamilton v. Gunther*, 32 Hun, 22.

RULE 34.

Effect of Independent Insurance by the Mortgagee upon His Interest.

When a mortgagee, independently of the owner and mortgagor, obtains a policy upon his own interest, and at his own expense, and for his sole benefit, upon payment of loss to him, the insurance company is entitled to subrogation;¹ and so, under such circumstances, when the mortgagee obtains the policy in form to the owner and mortgagor, with loss payable to him (the

mortgagee); this right of subrogation does not depend upon the contract.²

1. *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 359; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Concord Ins. Co. v. Woodbury*, 45 Me. 447; *French v. Fitch*, 67 Mich. 492. And see *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. Rep. 811; *Dick v. Franklin Ins. Co.*, 10 Mo. App. 376, *affd.*, 81 Mo. 103; *Sussex County Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Durnbrack v. Neall*, W. Va., 47 S. E. Rep. 303.

2. *Thomas v. Montauk Ins. Co.*, 43 Hun, 218. See Rule 36.

RULE 35.

Effect of Making Loss Payable to the Mortgagee without Mortgagee Clause.

If the policy is issued to the owner, with loss merely made payable to the mortgagee, without the mortgagee clause, the latter is merely an appointee to receive the loss (if any due) to the owner, with whom the contract of insurance is exclusively made,¹ and there can be no subrogation on payment to the mortgagee.²

1. *Moore v. Hanover Ins. Co.*, 141 N. Y. 219.

2. *Cone v. Niagara Ins. Co.*, 60 N. Y. 619. And see *Home Ins. Co. v. Marshall*, 48 Kans. 235, 29 Pac. Rep. 161; *Graves v. Hampden Ins. Co.*, 10 Allen (Mass.), 281. See also Rule 36.

RULE 36.

When no Mortgagee Clause and Owner or Mortgagor as Between Himself and Mortgagee Entitled to Benefit of the Insurance — Owner in Default.

If there is no "mortgagee clause" in the policy, operative as an independent contract of insurance with the mortgagee (when void as to the owner) under its special terms and conditions, and as between the owner and mortgagor and the mortgagee, the former

is entitled to the benefit of the insurance, as, for instance, where it is effected at the request or by the authority of the owner and mortgagor, or at his expense, or under circumstances which could make him chargeable with the premium, he is entitled to the benefit of the insurance obtained by the mortgagee, and there can be no subrogation upon payment of a loss to him, even if the policy was issued to and in the name of the mortgagee;¹ but where the owner and mortgagor is in default or has neglected to procure insurance as he agreed, and the mortgagee does procure the policy upon his own interest, at his own expense, though chargeable to the owner and mortgagor, he is at liberty to make any special contract or provision in the policy as to subrogation in the event of loss, which special agreement will be operative and binding as against the owner and mortgagor.²

1. *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 428; *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. Rep. 811; *Norwich Union Ins. Co. v. Boomer*, 52 Ill. 442; *Stinchfield v. Miliken*, 71 Me. 567; *Concord Ins. Co. v. Woodbury*, 45 Me. 447; *Pendleton v. Elliot*, 67 Mich. 496, 35 N. W. Rep. 97; *Nelson v. Insurance Co.*, 43 N. J. Eq. 256; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Loudren v. Waddle*, 98 Pa. St. 242; *French v. Fitch*, 67 Mich. 492; *Suffolk Ins. Co. v. Boyden*, 9 Allen (Mass.), 123; *Ætna Ins. Co. v. Baker*, 71 Ind. 102.

2. *Foster v. Van Reed*, 70 N. Y. 19.

RULE 37.

Mortgagor May be Subrogated to Rights of Mortgagee in Insurance.

Where a policy is assigned to a mortgagee by the mortgagor, with consent of the company, as collateral or additional security for the mortgage debt, upon its

payment by the mortgagor he is subrogated to the rights of the mortgagee in the policy.

Billings v. German Ins. Co., 34 Nebr. 502, 52 N. W. Rep. 397.

RULE 38.

Sureties May be Subrogated to Claim of Mortgagee.

Sureties on a note secured by mortgage, who pay the same, are entitled to be subrogated to the claim of the mortgagee to the insurance moneys.

Ætna Ins. Co. v. Thompson, 68 N. H. 20, 40 Atl. Rep. 396. And as to sureties, see also *Merchants' Ins. Co. v. Story*, 13 Tex. Civ. App. 124, 35 S. W. Rep. 68.

RULE 39.

Effect of Owner and Mortgagee Preventing or Destroying Right of Subrogation.

Where parties have, by agreement or act, destroyed any right on part of the insurance company to be subrogated to rights of the mortgagee, they thereby release the insurance company from liability.

Lett v. Guardian Ins. Co., 52 Hun, 570, affd., 125 N. Y. 82; *Attleborough Savings Bank v. Security Ins. Co.*, 168 Mass. 147, 46 N. E. Rep. 390, 26 Ins. L. J. 620.

RULE 40.

Subrogation to Claim of a Vendor Under Executory Contract of Sale.

If a vendee, under an executory contract of sale, agrees to pay the expense of insurance by the vendor, and does so, the insurance exists for his benefit, and the insurance company has no right of subrogation to claim of vendor on payment of a loss to him,¹ but may be otherwise when, as between the vendor and vendee,

the latter is not entitled to any benefit from the insurance;² there can be no subrogation when the vendee is discharged from liability to the vendor by occurrence of the fire, or when as between them the vendee is entitled to the benefit of the insurance money in event of loss.³

1. *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Benjamin v. Saratoga Ins. Co.*, 17 N. Y. 415; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 467. And see *Washington Ins. Co. v. Kelly*, 32 Md. 421; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 247; *Allison v. Phoenix Ins. Co.*, 87 Tex. 593, 30 S. W. Rep. 547, 24 Ins. L. J. 873.

2. *Sussex County Ins. Co. v. Woodruff*, 26 N. J. L. 541. And see *Clinton v. Hope Ins. Co.*, *supra*.

3. *Clinton v. Hope Ins. Co.*, *supra*. And see *Insurance Co. v. Updegraff*, 21 Pa. St. 513.

In *Castellain v. Preston*, L. R., 11 Q. B. Div. 380, revg. 8 Q. B. Div. 613, it was held that where an executory contract of sale is made without reference to insurance, and there being a loss, the vendor receives the money under a policy obtained by him, and the vendee subsequently pays the full consideration to the vendor, the insurance company is entitled to recover from the vendor what it has paid upon the principle of subrogation.

In *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 467, the New York Court of Appeals says: "The general rule is that the vendee in a contract for the sale of land is entitled to any benefit or improvements happening to the land after the date of the contract, and must bear any loss, by fire or otherwise, which occur without fault of the vendor, nor is he entitled to the benefit of an insurance obtained by the vendor on his *own* account, and held for his *own* benefit."

So in England the rule is held to be that if property is destroyed before an executory contract for the sale is consummated, the vendee or purchaser, in the absence of any provision in the contract to the contrary, cannot claim nor receive the benefit of insurance money due upon a policy held by the vendor, either in reduction of amount due upon the purchase or by applying the money to replacing of the building. *Rayner v. Preston*, L. R., 14 Ch. Div. 297, *affd.*, L. R. 18 Ch. Div. 1. See also *Plimpton v. Farmers' Ins. Co.*, 43 Vt. 497; *Gilbert v. Post*, 28 Ohio St. 276; *Wright v. Continental Ins. Co.*, 117 Ga. 499, 43 S. E. Rep. 700; *Marion v. Wolcott*, N. J. Eq., 59 Atl. Rep. 242.

For decision on claim of the insurance company arising out of the same fire as in *Rayner v. Preston*, see *Castellain v. Preston*, L. R., 11 Q. B. Div. 380. And see *Tyler v. Aetna Ins. Co.*, 16 Wend. 385.

RULE 41.

Effect of a Vendee Taking an Assignment of a Mortgagee's Interest Under the Mortgage Clause.

A vendee of property subject to a mortgage and insured in name of vendor, but void as to him on account of the transfer, cannot acquire a claim to the insurance by taking an assignment of the mortgagee's interest therein under a mortgagee clause, because the insurance company having the right of reimbursement out of the property by subrogation to rights under the mortgage, such right to avoid circuity of action is a defense against the enforcement of the agreement itself.

Lett v. Guardian Ins. Co., 52 Hun, 570, *affd.*, 125 N. Y. 82.

RULE 42.

Effect of Insurance for Joint Benefit of Vendor and Vendee.

When the policy is issued to and held by an owner of property, who makes an executory contract of sale, which provides for the continuance of insurance for joint benefit of the vendee, the vendee agreeing to pay the expense or premium, and the vendor receives a mortgage from the vendee, the insurance company upon payment of a loss is not entitled to be subrogated or to an assignment of the mortgage, in the absence of any agreement to that effect.

Nelson v. Bound Brook Ins. Co., 43 N. J. Eq. 256, 11 Atl. Rep. 681, *revd.* 41 N. J. Eq. 485, 5 Atl. Rep. 590.

CHAPTER NINTH.

Limitation as to Suit or Action on Policy.

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RULE 1.

Limitation as Prescribed by Contract.

No suit or action on the policy shall be sustainable in any court of law or equity unless commenced within twelve months next after the fire.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	New Jersey,
Connecticut,	North Carolina,
Louisiana,	North Dakota,
Michigan,	*Pennsylvania,
Missouri,	Rhode Island.

The standard form of policy prescribed in Wisconsin does not contain any such limitation.

By the standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	

the limitation for commencement of suit or action is "within two years from the time the loss occurred."

In New Hampshire, same as preceding, except it is one year instead of two.

The South Dakota form (1905) does not contain any limitation.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

RULE 2.

Condition Valid and Binding.

The limitation clause in an insurance policy prescribing the time within which suit must be brought thereon is valid and binding upon the insured.

Riddlebarger v. Hartford Ins. Co., 7 Wall. (U. S.) 386; *Garretson v. Merchants' Ins. Co.*, 114 Iowa, 17, 86 N. W. Rep. 32; *Woodbury Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Chichester v. New Hampshire Ins. Co.*, 74 Conn. 510, 51 Atl. Rep. 545; *Graham v. Niagara Ins. Co.*, 106 Ga. 840, 32 S. E. Rep. 579; *Brooks v. Georgia Ins. Co.*, 99 Ga. 116, 24 S. E. Rep. 869; *Richter v. Michigan Ins. Co.*, 66 Ill. App. 606; *Stephens v. Phoenix Assur. Co.*, 85 Ill. App. 671; *Wilhelmi v. Des Moines Ins. Co.*, 103 Iowa, 532; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *Fullam v. Union Ins. Co.*, 7 Gray (Mass.), 61; *Ward v. Pennsylvania Ins. Co.*, 82 Miss. 124, 33 So. Rep. 841; *Ghio v. Western Assur. Co.*, 65 Miss. 532; *Keim v. Mutual Ins. Co.*, 42 Mo. 38; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469; *Roach v. New York Ins. Co.*, 30 N. Y. 546; *Wilkinson v. First National Ins. Co.*, 72 N. Y. 499; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Wiloughby v. St. Paul German Ins. Co.*, 68 Minn. 373, 71 N. W. Rep. 272; *Universal Ins. Co. v. Weiss*, 106 Pa. St. 20; *Higgins v. Windsor Ins. Co.*, 54 Vt. 270; *Virginia Ins. Co. v. Aiken*, 82 Va. 424; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. Rep. 514; *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich., 98 N. W. Rep. 761.

Exception.—In Nebraska it is rejected or construed to be void as against public policy. *Omaha Ins. Co. v. Drennen*, 56 Nebr. 623, 77 N. W. Rep. 67; *Grand View Building Assoc. v. Northern Assur. Co.*, Nebr., 102 N. W. Rep. 246. And so in South Dakota it is held void as being in conflict with a statute. *Vesey v. Commercial Union Assur. Co.*, S. D., 101 N. W. Rep. 1074; *Phoenix Ins. Co. v. Perkins*, S. D., 101 N. W. Rep. 1110.

RULE 3.

Part of a Parol Contract of Insurance.

The limitation clause in the policy becomes part of a parol contract of insurance, although policy is never delivered and assured is in ignorance of its existence.

DeGrove v. Metropolitan Ins. Co., 61 N. Y. 594.

RULE 4.**Does not Apply to Reinsurance Contracts.**

The limitation clause in the policy does not apply to reinsurance contracts;¹ or at least does not begin to run until the reinsured company has paid the loss under the original policy issued by it.²

1. *Alker v. Rhoads*, 73 App. Div. 158, 76 N. Y. Supp. 808, citing *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124.

2. *Royal Ins. Co. v. Vanderbilt Ins. Co.*, 102 Tenn. 264, 52 S. W. Rep. 168, 28 Ins. L. J. 910.

RULE 5.**Operation Suspended by War.**

War suspends the operation of the limitation clause;¹ and so does a statute which in terms prohibits the maintenance of an action.²

1. *Semmes v. City Ins. Co.*, 13 Wall. (U. S.) 158.

2. *North British & M. Ins. Co. v. Edwards*, Miss. , 37 So. Rep. 748.

RULE 6.**Does not Apply to Independent Agreement to Pay.**

The limitation clause in the policy is not operative upon a distinct and independent agreement to pay the amount of the loss in consideration of the surrender and cancellation of the policy.

Smith v. Glens Falls Ins. Co., 62 N. Y. 85. And see *Illinois Ins. Co. v. Archdeacon*, 82 Ill. 236; *Hanover Ins. Co. v. Hatton* (Ky.), 55 S. W. Rep. 681.

RULE 7.**An Adjustment and Promise to Pay the Amount of an Adjustment Do not Mean Same Thing.**

An adjustment of the amount of a loss by the assured and an insurance company does not raise an implied promise to pay it; there must be an express prom-

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ise to pay the amount of the adjustment, to create a new liability, and make it independent of the limitation clause in the policy.

Willoughby v. St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. Rep. 272, 27 Ins. L. J. 252.

RULE 8.

Effect of Death of Insured.

Where the assured is dead at time of fire, and leaves a will, which is contested, it is the duty of the executor named in the will, or of some one interested in the policy, to promptly apply for the appointment of a temporary administrator, that proper notice of loss may be given, proofs furnished, and suit commenced within the limited time, by him, if necessary; if no effort made in that direction there is no excuse for such delay and action is barred by the limitation clause.

Mathews v. American Central Ins. Co., 154 N. Y. 449, 48 N. E. Rep. 751, 27 Ins. L. J. 193, 39 L. R. A. 433, affg. 9 App. Div. 339, 41 N. Y. Supp. 304.

RULE 9.

When Binding upon Mortgagee — Waiver.

The limitation clause is binding upon the mortgagee to whom loss is payable, as well as upon the insured, notwithstanding a mortgagee clause;¹ but otherwise where policy provides that "if issued upon interest of mortgagee, assured must first exhaust primary security before he can recover the insurance; in such a case the limitation clause is inoperative, and ordinary statute of limitation applies,² or the time to sue is extended.³ Payment to a mortgagee to whom the loss is

payable does not waive the limitation as against the insured.⁴

1. *American Bldg. & Loan Assoc. v. Farmers' Ins. Co.*, 11 Wash. 619, 40 Pac. Rep. 125, 24 Ins. L. J. 838. And see *Shawnee Ins. Co. v. Bayha*, 8 Kans. App. 169, 55 Pac. Rep. 474.

2. *Dwelling-House Ins. Co. v. Kansas Loan & Trust Co.*, 5 Kans. App. 137, 48 Pac. Rep. 891, 26 Ins. L. J. 603.

3. *Hay v. Star Ins. Co.*, 13 Hun, 496, affd., 77 N. Y. 235.

4. *King v. Watertown Ins. Co.*, 47 Hun, 1, affd., 132 N. Y. 338.

RULE 10.

Runs from Date of Fire.

Where policy so provides the limitation runs from the date of the fire, and not from date when loss is ascertained or becomes payable.

Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. Rep. 332, 23 Ins. L. J. 32; *Chichester v. New Hampshire Ins. Co.*, 74 Conn. 510, 51 Atl. Rep. 545; *Eagan v. Oakland Ins. Co.*, 29 Oreg. 403, 42 Pac. Rep. 990, 25 Ins. L. J. 534; *Daly v. Concordia Ins. Co.*, 16 Colo. 349, 65 Pac. Rep. 416; *Prevost v. Scottish Union & Nat. Ins. Co.*, Rap. Jud. Quebec, 14 C. S. 203; *State Ins. Co. v. Stoffels*, 48 Kans. 205, 29 Pac. Rep. 479; *Allemannia Ins. Co. v. Little*, 20 Ill. App. 431; *King v. Watertown Ins. Co.*, 47 Hun, 1; *Allen v. Dutchess Co. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530. And the distinction in use of word "fire" instead of "loss" is pointed out in *Steen v. Niagara Ins. Co.*, 89 N. Y. 324; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170. This rule does not apply in some courts and jurisdictions. See Rule 11.

RULE 11.

Does not Commence to Run Until Loss is Payable.

The clause making the time to commence suit from occurrence or date of the fire makes no substantial difference in the meaning as formerly construed when the word "loss" was used instead of "fire." The clause must be construed as intending to give twelve full months in which to bring suit, exclusive of the

time when under other clauses of the policy suit cannot be brought. The right to commence suit being postponed to sixty days after proofs of loss are furnished, the twelve months' limitation does not commence to run until after the expiration of the sixty days;¹ and so is suspended by the pendency or continuance of an appraisal.²

1. *Steel v. Phoenix Ins. Co.*, 51 Fed. Rep. 715, 7 U. S. App. 325, 2 C. C. A. 463, revg. 47 Fed. Rep. 863, and affirmed by divided court without opinion, 154 U. S. 518, 14 Sup. Ct. Rep. 1153, 38 L. ed. 1064; *Friezen v. Allemannia Ins. Co.*, 30 Fed. Rep. 352; *Vette v. Clinton Ins. Co.*, 30 Fed. Rep. 668; *Sample v. London & Lancashire Ins. Co.*, 46 S. C. 491, 24 S. E. Rep. 334, 25 Ins. L. J. 576; *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. Rep. 743; *German Ins. Co. v. Davis*, 40 Nebr. 700, 59 N. W. Rep. 698, 23 Ins. L. J. 768; *Harrison v. Hartford Ins. Co.*, 112 Iowa, 77, 80 N. W. Rep. 309; *Reade v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665. And see *Case v. Sun Ins. Co.*, 83 Cal. 473, 23 Pac. Rep. 534; *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135; *Putze v. Saginaw Valley Ins. Co.*, 132 Mich. 670, 94 N. W. Rep. 191, reversing on rehearing previous opinion, 86 N. W. Rep. 814. (But this rule does not apply in some jurisdictions. See Rule 10.) Whenever a policy in terms provides that limitation runs from "date of loss or occurrence of loss," it is construed as the date when the loss accrues or becomes payable. *New Haven Steamboat Co. v. Providence-Washington Ins. Co.*, 10 App. Div. 284; dissenting opinion of Barrett, J., adopted by the Court of Appeals in reversing judgment, 159 N. Y. 547; *Rogers v. Aetna Ins. Co.*, 95 Fed. Rep. 103, 35 C. C. A. 396, 28 Ins. L. J. 808; *Rogers v. Home Ins. Co.*, 95 Fed. Rep. 109, 35 C. C. A. 402; *Mayor v. Hamilton Ins. Co.*, 39 N. Y. 45; *Steen v. Niagara Ins. Co.*, 89 N. Y. 315; *Hay v. Star Ins. Co.*, 77 N. Y. 235; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. Rep. 777; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. Rep. 1034; *German Ins. Co. v. Fairbank*, 32 Nebr. 750, 49 N. W. Rep. 711; *Chandler v. St. Paul Ins. Co.*, 21 Minn. 85; *Barber v. Insurance Co.*, 16 W. Va. 658. But the courts do not agree in construction of such language, and some hold that the "loss occurs" when the fire occurs. *Brooks v. Georgia Home Ins. Co.*, 99 Ga. 116, 24 S. E. Rep. 869; *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Carraway v. Merchants' Ins. Co.*, 26 La. Ann. 298; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Fullam v. New York*

Ins. Co., 7 Gray (Mass.), 61; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151; *Grigsby v. German Ins. Co.*, 40 Mo. App. 276; *Rothier v. German Ins. Co.*, 84 Minn. 116, 86 N. W. Rep. 888. See also *McFarland v. Association*, 5 Wyo. 126, 38 Pac. Rep. 347, 27 L. R. A. 48.

2. *Fritz v. British-American Assur. Co.*, 208 Pa. St. 268, 57 Atl. Rep. 573.

RULE 12.

When Time Expires on Sunday.

If the limited time expires on Sunday, the assured has the following day, Monday, to commence his action;¹ the date fire occurred is excluded in calculation;² but if the fire extends over into another day, such additional day must be included.³

1. *Owen v. Howard Ins. Co.*, 87 Ky. 571.

2. *Dwelling-House Ins. Co. v. Osborn*, 1 Kans. App. 197.

3. *Allemannia Ins. Co. v. Little*, 20 Ill. App. 431.

RULE 13.

Computation of Time in Months.

When time limited in policy expires a certain number of months from the date of the fire, such time has reference to calendar months, and expires on the same day of the month as fire occurred, and counting the number of months prescribed, excluding the month in which the fire occurred.

Daly v. Concordia Ins. Co., 16 Col. 349, 65 Pac. Rep. 416.

RULE 14.

Effect of Attempt to Commence Action Under a Statute.

Practically the limitation prescribed in a standard form is one specially prescribed by law, as well as by contract, and hence a statute providing that an attempt to commence an action by delivery of process to a

sheriff, with intent to have served, is equivalent to commencement of an action, applies to such limitation;¹ but otherwise when delivery of process is to one who is not a sheriff or officer.²

1. *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. Rep. 863, revg. 81 Hun, 207. And see also *Gough v. McFall*, 31 App. Div. 578, 52 N. Y. Supp. 221; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. Rep. 183; *German Ins. Co. v. Wright*, 6 Kans. App. 611, 49 Pac. Rep. 704.

2. *Lesure Lumber Co. v. Mutual Ins. Co.*, 101 Iowa 514, 70 N. W. Rep. 761.

RULE 15.

Filing Præcipe for Summons — Distinction Between Setting Aside Service and Summons.

Filing of a præcipe for a summons or process against an insurance company may be regarded as the commencement of an action, although the summons is not actually served until after the limited time;¹ but where the summons is issued and served in proper time, but both the summons and service are vacated and set aside by the court, issue and service of a summons after the limited time are too late;² but where service only set aside, and writ itself remains in force and there is no termination of the action by nonsuit or dismissal, an *alias* writ may be properly served even if such service is after the limited time and action is not barred.³

1. *Schroeder v. Merchants & Mechanics' Ins. Co.*, 104 Ill. 71. And see *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

2. *State Ins. Co. v. Stoffels*, 48 Kans. 205, 29 Pac. Rep. 479.

3. *Everett v. Niagara Ins. Co.*, 142 Pa. St. 322; *American Central Ins. Co. v. Haws*, Pa. St. , 11 Atl. Rep. 107. And see *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 754.

RULE 16.

Amendment of Summons or Complaint.

A summons cannot be amended as to its date and issue by a second summons to avoid the operation of the limitation clause in the policy; it cannot be treated as an *alias*;¹ but a complaint may be amended after expiration of limited period without introducing a new cause of action.²

1. *Peek v. German Ins. Co.*, 102 Mich. 52, 60 N. W. Rep. 453.

2. *Johnston v. Farmers' Ins. Co.*, 106 Mich. 96, 64 N. W. Rep. 5; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. Rep. 185.

RULE 17.

Amendment as to Name of Party.

A summons or process served on proper party in time may be subsequently amended as to name of such party, when such amendment is authorized by law or statute.

Burton v. Buckeye Ins. Co., 26 Ohio St. 467.

RULE 18.

Failure of Previous Action — Effect of Statute — Action at Law May be Regarded as Continuance of Prior Suit in Equity.

Failure of a previous action upon the policy as by a dismissal or nonsuit or from any cause cannot alter the effect or change the operative force of the limitation clause, even although the second suit purports on its face to be a renewal of the first action;¹ the second suit must be brought within time limited by the policy, even though there is a general statute that a second suit shall be regarded as a continuation of the first.²

But where suit is brought in equity to reform policy and a subsequent action is brought at law to recover upon the policy as reformed, latter action may be deemed a continuance of the former;³ and so where suit fails in equity for reformation, a court having jurisdiction should permit continuance of action at law upon the policy by proper amendment of the complaint.⁴

1. *Nelson v. Phoenix Ins. Co.*, 97 Ga. 722, 25 S. E. Rep. 189. And see *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *McFarland v. Aetna Ins. Co.*, 6 W. Va. 437; *McIntyre v. Michigan Ins. Co.*, 52 Mich. 188; *State Ins. Co. v. Stoffel*, 48 Kans. 205, 29 Pac. Rep. 479; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170, 18 Atl. Rep. 614; *Riddlebarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Ward v. Penn. Ins. Co.*, 82 Miss. 124, 33 So. Rep. 841; *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462; *Wilkinson v. Insurance Co.*, 72 N. Y. 499; *Williams v. Greenwich Ins. Co.*, 98 Ga. 532, 25 S. E. Rep. 31; *Smith v. Herd*, Ky. , 60 S. W. Rep. 841.

2. *Harrison v. Hartford Ins. Co.*, 102 Iowa, 112, 71 N. W. Rep. 220; *Wilhelmi v. Des Moines Ins. Co.*, 103 Iowa, 532, 72 N. W. Rep. 685, 68 N. W. Rep. 782; *Chichester v. New Hampshire Ins. Co.*, 74 Conn. 510, 51 Atl. Rep. 545; *Harrison v. Hartford Ins. Co.*, 67 Fed. Rep. 298; *Howard Ins. Co. v. Hocking*, 130 Pa. St. 170, 18 Atl. Rep. 614. And see *Riddlebarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *McElroy v. Continental Ins. Co.*, 48 Kans. 200, 29 Pac. Rep. 478.

3. *Jacobs v. St. Paul Ins. Co.*, 86 Iowa, 145, 53 N. W. Rep. 101.

4. *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357. The limitation is no bar when previous case was dismissed contrary to a stipulation. *Phoenix Ins. Co. v. Belt R. Co.*, 182 Ill. 33, 54 N. E. Rep. 1046.

RULE 19.

Suit in Equity May be Regarded as Continuance of Action at Law — Exceptions.

Where an action at law is brought within proper time, filing of a bill in equity for reformation, after

the prescribed time, may be regarded as in aid or continuance of the prior action;¹ otherwise when no previous action brought or is pending,² or when previous action has been dismissed or terminated by nonsuit.³

1. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. Rep. 724; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517. And see *Hamburg-Bremen Ins. Co. v. Pelzer Mfg. Co.*, 76 Fed. Rep. 479, 22 C. C. A. 283; *Grand View Building Assoc. v. Northern Assur Co.*, Nebr. , 102 N. W. Rep. 246.

2. *Thompson v. Phenix Ins. Co.*, 25 Fed. Rep. 296.

3. *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462. And see Rule 18.

RULE 20.

Statute May Permit New Action After Nonsuit.

Where statute specifically provides that after assured is nonsuited or suffers a nonsuit in action on the policy, he may commence a new action at any time within one year thereafter, it supersedes the limitation clause in the policy.

Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. Rep. 66.

RULE 21.

Effect of Garnishee or Attachment Proceedings — Injunction — Relief by Cross-Bill.

Garnishee or attachment proceedings may be sufficient commencement of suit in limited time;¹ but an injunction restraining the assured from collecting claim under the policy does not suspend the limitation clause; suit must be brought in limited time;² but assured may obtain relief by cross-bill in same suit.³

1. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310; *Ritter v. Boston Underwriters*, 28 Mo. App. 140.

2. *Wilkinson v. First National Ins. Co.*, 72 N. Y. 499.

3. See Rule 25.

RULE 22.

Effect of Bad Faith on Part of Company Retaining Policy and Refusing Copy.

When an action at law upon the policy is dismissed in consequence of the insurance company in bad faith taking and keeping possession of the policy, and refusing to furnish a copy, and a bill is subsequently filed in equity to obtain proper relief by reformation, the limitation clause is no bar to the suit.

Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 So. Rep. 887.

RULE 23.

Effect of Insurance of a Mechanic's Lien Interest — Time Necessarily Extended by Provisions of Policy.

Where a mechanic's lien interest is insured and its value cannot be ascertained in time, it operates to suspend the limitation clause or render it inoperative;¹ and so where it is impossible to comply with provisions of the policy before expiration of the prescribed time.²

1. *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Stout v. City Ins. Co.*, 12 Iowa, 371.

2. *Case v. Sun Ins. Co.*, 83 Cal. 473. And see *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537.

RULE 24.

No Substitution of New Cause of Action by Amendment After Limited Time.

After the expiration of the time limited in the policy for the commencement of an action to recover a loss thereunder, the plaintiff cannot amend so as to change

his alleged cause of action from one directly on the policy, to one founded on an alleged compromise and an agreement to pay the amount of the same. Such a new undertaking cannot be separated from the policy, or from its terms and stipulations, but must be enforced, if enforced at all, with full reference to the original contract itself; such a promise cannot be introduced by amendment after the expiration of the time limited in the policy.

Grier v. Northern Assur. Co., 183 Pa. St. 334, 39 Atl. Rep. 10.

RULE 25.

When Companies Have Obtained Injunction Against Insured He May Have Relief by Cross-Bill.

Where an insurance company has filed a bill in equity to set aside an award of appraisers on ground of fraud, and obtained an injunction restraining the insured from proceeding on the award or policy, the assured may obtain full relief by filing a cross-bill setting up the fact, and the court having jurisdiction will retain it for all purposes and the limitation clause in the policy will not be allowed under the circumstances to defeat the assured.

North British & M. Ins. Co. v. Lathrop, 70 Fed. Rep. 429, 25 U. S. App. 443, 17 C. C. A. 175.

RULE 26.

Effect of Interpleader by a Third Party.

Where a third party, a judgment creditor, interpleads and claims insurance moneys in a suit brought

by the assured, and before trial the plaintiff discontinues his action, and it proceeds as between the company and the interpleader, the latter is barred by the limitation clause in the policy if he did not commence his proceeding within limited time,¹ but an intervenor, claiming an interest in the proceeds of the insurance, who becomes a party to an action pending and continued by the assured, is not barred.²

1. *American Ins. Co. v. Buford Implement Co.*, 8 *Kans. App.* 36, 54 *Pac. Rep.* 6.

2. *Stevens v. Citizens' Ins. Co.*, 69 *Iowa*, 658.

RULE 27.

Waiver of the Limitation.

The limitation clause is waived by a promise to pay or to adjust or settle without suit;¹ and so by negotiations for a settlement tending to induce belief that claim will be amicably settled without suit;² but mere negotiation with the assured, who has ample opportunity to commence suit but neglects to do so, does not waive the limitation clause;³ it is only when the requirements or negotiation by the insurance company causes or induces the delay in commencing suit that there is a waiver.⁴ A waiver can be inferred only from what occurs during the limited period,⁵ and need not be evidenced in writing.⁶

1. *Steel v. Phoenix Ins. Co.*, 51 *Fed. Rep.* 715, 2 *C. C. A.* 463, 22 *Ins. L. J.* 7; *Galloway v. Standard Ins. Co.*, 45 *W. Va.* 237, 31 *S. E. Rep.* 969, 28 *Ins. L. J.* 125; *Metcalf v. Phoenix Ins. Co.*, 21 *R. I.* 307, 43 *Atl. Rep.* 541; *Hartford Ins. Co. v. Amos*, 98 *Ga.* 533, 25 *S. E. Rep.* 575. And see *Farmers' Ins. Co. v. Chestnut*, 50 *Ill.* 111; *Solomon v. Metropolitan Ins. Co.*,

42 N. Y. Super. 22; *Horst v. City of London Ins. Co.*, 73 Tex. 67, 11 S. W. Rep. 148.

2. *Phoenix Ins. Co. v. Rad Bila Hora*, 41 Nebr. 21, 59 N. W. Rep. 752; *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Burlington Ins. Co. v. Toby*, 10 Tex. Civ. App. 425, 30 S. W. Rep. 1111; *David v. Oakland Home Ins. Co.*, 11 Wash. 181, 39 Pac. Rep. 443, 24 Ins. L. J. 348; *Scottish U. & N. Ins. Co. v. Enslie*, 78 Miss. 157, 28 So. Rep. 822; *Alten v. McFall*, 89 Fed. Rep. 463; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Allemannia Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. Rep. 538; *St. Paul F. & M. Ins. Co. v. McGregor*, 63 Tex. 399; *Home Ins. Co. v. Meyer*, 93 Ill. 271; *Martin v. State Ins. Co.*, 44 N. J. L. 485; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Black v. Winneshiek Ins. Co.*, 31 Wis. 74; *Curtis v. Home Ins. Co. (U. S. Cir.)*, 1 Biss. 485; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287; *Little v. Phoenix Ins. Co.*, 123 Mass. 389; *Brown v. Commercial Ins. Co.*, 21 App. D. C. 325; *McArdle v. German Alliance Ins. Co.*, App. Div. , 90 N. Y. Supp. 485.

3. *Allemannia Ins. Co. v. Little*, 20 Ill. App. 431; *Phoenix Ins. Co. v. Labcher*, 20 Ill. App. 450; *Garido v. American Central Ins. Co. (Cal.)*, 8 Pac. Rep. 512, 16 Ins. L. J. 151; *Garretson v. Hawkeye Ins. Co.*, 65 Iowa, 468; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *National Ins. Co. v. Brown*, 128 Pa. St. 386; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

4. *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. Rep. 783; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 327; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. Rep. 1019; *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 184; *Horst v. London Ins. Co.*, 73 Tex. 67, 11 S. W. Rep. 148; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Bonnert v. Insurance Co.*, 129 Pa. St. 558; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537, affd., 39 N. Y. 45; *Barnum v. Merchants' Ins. Co.*, 97 N. Y. 188; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253; *Black v. Winneshiek Ins. Co.*, 31 Wis. 74; *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 389; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266; *Frels v. Farmers' Ins. Co.*, Wis. , 98 N. W. Rep. 522.

5. *Everett v. London & Lancashire Ins. Co.*, 142 Pa. St. 332, 21 Atl. Rep. 819.

6. *Hutchinson v. Liverpool, L. & G. Ins. Co.*, 153 Mass. 143, 26 N. E. Rep. 439; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. Rep. 1016; *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. Rep. 783.

RULE 28.

No Waiver when Insured Has Ample Opportunity to Commence Suit and Delays it.

Where assured has right by denial of liability after negotiation or upon ceasing of negotiation to commence suit at once, having ample opportunity and delays doing so until after the expiration of the time prescribed, he cannot claim that negotiations caused the delay, or that they amount to a waiver of same;¹ while denial of liability may be evidence of a waiver of conditions precedent to a loss becoming due and payable, it is not evidence of waiver of condition prescribing time within which suit must be brought.²

1. *Lentz v. Teutonia Ins. Co.*, 96 Mich. 445, 55 N. W. Rep. 993, 22 Ins. L. J. 838; *John Morrill & Co. v. New England Ins. Co.*, 71 Vt. 281, 44 Atl. Rep. 358. And see *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Garretson v. Hawkeye Ins. Co.*, 65 Iowa, 468; *Blanks v. Insurance Co.*, 36 La. Ann. 599; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Steel v. Phoenix Ins. Co.*, 51 Fed. Rep. 715, 2 C. C. A. 463; *Universal Ins. Co. v. Weiss*, 106 Pa. St. 20; *Allen v. Dutchess Co. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530. And see Rule 27.

2. *Farmers' Ins. Co. v. Barr*, 94 Pa. St. 345.

RULE 29.

Waiver by Providing Fund for Payment—Insolvent Company.

The limitation clause is waived by an insolvent insurance company providing a fund for the payment of the claim to the extent of such fund.

Re *St. Paul German Ins. Co.*, 58 Minn. 163, 59 N. W. Rep. 996, 24 Ins. L. J. 130. And see *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

RULE 30.

Waiver in Appraisal — Estoppel.

Dilatory action of appraisers operates as a waiver of the limitation clause; in such a case both parties are responsible for the acts of the appraiser and umpire;¹ and so the insurance company is estopped where it has induced the delay in commencing suit by promising an appraisal.²

1. *Austen v. Niagara Ins. Co.*, 16 App. Div. 86, 45 N. Y. Supp. 106. And see *Williams v. German Ins. Co.*, 90 App. Div. 413, 86 N. Y. Supp. 98; *Fritz v. British-American Assur. Co.*, 208 Pa. St. 268, 57 Atl. Rep. 573.

2. *Goodwin v. Merchants' Ins. Co.*, 118 Iowa, 601, 92 N. W. Rep. 894.

RULE 31.

Waiver by Local Agent or Adjuster.

Where a local agent negotiates with the insured for a settlement and thereby induces him to delay the commencement of the suit, it is evidence of waiver of the limitation clause or of fraud as an estoppel;¹ and same rule applies to an adjuster;² but neither a local agent nor an adjuster merely as such have authority to waive the limitation clause;³ there should be some evidence of authority;⁴ or ratification;⁵ but authority may be implied from authority to adjust and settle;⁶ and is implied in case of an officer of the company.⁷

1. *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 44 N. E. Rep. 746; *German Ins. Co. v. Amsbaugh*, 8 Kans. App. 197, 55 Pac. Rep. 481; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266.

2. *Underwriters' Agency v. Sutherlin*, 55 Ga. 266; *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

3. *Underwriters' Agency v. Sutherlin*, 55 Ga. 266.

4. *Insurance Co. v. Brodie*, 52 Ark. 11; *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich. , 98 N. W. Rep. 761.

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5. *German Ins. Co. v. Carrow*, 21 Ill. App. 631; *Burlington Ins. Co. v. Toby*, 10 Tex. Civ. App. 425, 30 S. W. Rep. 1111.

6. *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. Rep. 783.

7. *Universal Ins. Co. v. Stewart*, 3 Penny. (Pa.) 536. And see "Adjuster and Adjustment;" also, "Statement or Proof of Loss," p. 226.

RULE 32.

Extension of Time by Company.

Where the insurance company voluntarily extends the time for the commencement of an action it cannot withdraw such extension, nor attach conditions to it without consent of the assured.

Cockran v. London Assur. Co., 93 Va. 553, 25 S. E. Rep. 597.

RULE 33.

Effect of Statute Prescribing Limitation as to Insurance Policies.

Where there is a statute prescribing a certain time for commencement of actions upon insurance policies, it renders the limitation clause in the policy inoperative if in conflict with it.¹ The contract limitation in the policy controls a general statute of limitations.²

1. *Small v. Westchester Ins. Co.*, 51 Fed. Rep. 789, 22 Ins. L. J. 660; *German Ins. Co. v. Luchet*, 12 Tex. Civ. App. 139, 34 S. W. Rep. 173. And see *Muse v. London Assur. Co.*, 108 N. C. 240, 13 S. E. Rep. 94; *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799; *Insurance Co. of N. A. v. Brim*, 111 Ind. 281; *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180.

2. *Mead v. Phoenix Ins. Co.*, Kans., 75 Pac. Rep. 475, 64 L. R. A. 79. And see Rule 2. In Nebraska it is *held* that the limitation clause being in conflict with the general statute of limitations is void as against public policy. *Miller v. State Ins. Co.*, 54 Nebr. 121, 74 N. W. Rep. 416.

RULE 34.**Limitation as Applied to Lloyds Policy.**

Where the policy is made and issued by Lloyds underwriters providing in substance that action shall be brought against one underwriter, which shall be decisive of claim against the others, and one of them is properly served with process in limited time, the other underwriters cannot plead the limitation clause in the policy.

New Jersey Concentrating Works v. Ackerman, 6 App. Div. 540.

CHAPTER TENTH.

Waiver of the Terms and Conditions of Policy — Estoppel.

- RULE**
1. Waiver as governed and limited by contract.
 2. Same subject — Specific exception as to appraisal and examination.
 3. Waiver as affected by standard form of policy — Estoppel.
 4. Waiver irrevocable — Not operative as to future.
 5. Waiver as affected by construction of two classes of conditions.
 6. Distinction between waiver and estoppel.
 7. Waiver is no presumption of law.
 8. Insured bound by limitations on agent's authority in accepted policy.
 9. Limitation on preceding rule — Estoppel — Construction by company's agent.
 10. Same subject — May be evidence of authority — Question of fact.
 11. Same subject — Estoppel — Distinction.
 12. Same subject — Limitation on authority of agent no application to inception of contract prior to its delivery.
 13. Limitation to certain officer may be waived.
 14. Limitation of authority no application to officers of company.
 15. Waiver may be effective though not in mode specified.
 16. Issue and delivery of policy with knowledge of facts — Burden of proof.
 17. Knowledge of facts acquired previously.
 18. Must be actual knowledge — Constructive notice — Public records.
 19. Estoppel does not always depend on actual knowledge when policy issues — Sufficient if company put upon inquiry.
 20. Knowledge of insured's intention to do something in future no estoppel — Oral promise and opinion by agent.

- RULE 21.** Rule as to estoppel when policy issues no application to future acts or omissions.
22. Effect of promise by agent to make indorsement on policy to which he has access in possession of a third party — Exception.
 23. Authority of soliciting agents.
 24. Same subject — Estoppel — Written application.
 25. Error in application — Estoppel — Parol evidence.
 26. Power of agents to employ clerks — Their authority.
 27. Limitation on agent's authority in policy, operative after its issue.
 28. Same subject — Limitation to preceding rule.
 29. Test of authority of agent as bearing on a question of waiver.
 30. Effect of failure to cancel and return unearned premium.
 31. Effect of payment of premium and receipt therefor after issue of policy.
 32. Effect of written consent held for insured by agent — Effect of his statement.
 33. Effect of written indorsement for another purpose.
 34. Waiver by treating policy as in force after a fire.
 35. Same subject — Limitation on preceding rule.
 36. Forfeiture not favored — Estoppel.
 37. Effect of officer or agent acting in ignorance of what others know or have done or said.
 38. In absence of express waiver there must be some elements of estoppel — Silence.
 39. When silence may be an element of estoppel.
 40. Waiver dependent on intention — May be inferred.
 41. Knowledge essential element of waiver.
 42. Refusal to pay on specified ground as estoppel.
 43. Omission to disclose ground of defense when claim made.
 44. Waiver not prevented by assertion of no waiver.
 45. Acceptance or retention of premium after fire as evidence of waiver.
 46. Effect of agreement in settlement and compromise.
 47. Effect of offer in compromise.
 48. Authority of local agents.
 49. Limitation on authority of agents in policy no application to adjuster — Estoppel.

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RULE 50. Authority of adjuster.

51. Adjuster cannot treat policy as both void and valid —
Judged by what he does.
52. A nonwaiver agreement does not necessarily prevent
waiver.
53. Nonwaiver agreement not extended by construction.
54. Stipulation by insured does not necessarily prevent
waiver by adjuster.
55. Nonwaiver agreement must be received and considered
by the court.
56. Facts occurring before execution of nonwaiver agree-
ment.
57. Effect of assertion by adjuster that policy is void,
coupled with suggestion for proofs.
58. Waiver as question of fact or law.
59. Waiver of premium.
60. Waiver of condition precedent should be pleaded.
61. Pleading and evidence of waiver or estoppel as to an
affirmative defense.

RULE 1.

Waiver as Governed and Limited by Contract.

The policy is made and accepted subject to its stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed thereon or added thereto, and no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy except such as by its terms may be the subject of agreement indorsed thereon or added thereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting

the insurance under the policy exist or be claimed by the insured unless so written or attached.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,

New Jersey,
North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

In Wisconsin the standard form prescribed is same as preceding except the following clause is added: "Up to the time of the delivery of the policy to assured, in all transactions relating to the policy or to the property therein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company."

The standard form of policy prescribed in:

Maine,
Massachusetts,
Minnesota,

New Hampshire,
South Dakota,

does not contain such provision.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use. See Rule 49.

RULE 2.

Same Subject — Specific Exception as to Appraisal and Examination.

The insurance company does not waive any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

to the appraisal, or to any examination in the policy provided for.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Michigan,
Missouri,

New Jersey,
North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

In Wisconsin the standard form prescribes same as preceding except the clause is inserted "except as above expressly provided for." (See appraisal clause in Wisconsin form under "Appraisal.")

The standard form of policy prescribed in:

Maine,
Massachusetts,
Minnesota,

New Hampshire,
South Dakota,

does not contain such provision.

In the States where no standard form is prescribed and other than those above named, the New York standard form is in general use.

Above rule is recognized and enforced by the courts in *Briggs v. Firemen's Fund Ins. Co.*, 65 Mich. 52; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510; *City Drug Store v. Scottish Union & Nat. Ins. Co. (Tex.)*, 44 S. W. Rep. 21; *American Central Ins. Co. v. Nunn*, Tex. , 82 S. W. Rep. 497, revg. 79 S. W. Rep. 88. And see "Appraisal," "Examination," and "Limitation," Rule 30.

RULE 3.

Waiver as Affected by Standard Form of Policy — Estoppel.

A question of waiver may be affected by a standard form of fire insurance contract prescribed in specific

* See note to "Duty to Save and Preserve Property," Rule 1, page 2.

terms by statute, but not estoppel; an insurance company may estop itself notwithstanding.

Matthews v. Capital Ins. Co., 115 Wis. 272, 91 N. W. Rep. 675; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295. And see *Bourgeois v. Northwestern Nat. Ins. Co.*, 86 Wis. 606; *Welch v. Fire Assoc.*, Wis. , 98 N. W. Rep. 227. See also "Construction."

RULE 4.

Waiver Irrevocable—Not Operative as to Future.

A waiver once made is irrevocable and cannot be recalled by the insurance company;¹ but cannot be construed to operate as a waiver of subsequent violation of same condition.²

1. *McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112, affd. without opinion, 169 N. Y. 590; *German Ins. Co. v. Gibson*, 53 Ark. 494; *Roberts v. Insurance Co. of N. A.*, 94 Mo. App. 142, 72 S. W. Rep. 144; *Bromfield v. Mercantile Ins. Co.*, 84 Mo. App. 134; *Monger v. Rockingham Ins. Co.*, 96 Va. 442, 31 S. E. Rep. 609; *Westchester Ins. Co. v. McAdoo*, 57 S. W. Rep. 409, affd. orally by Supreme Court Tenn. 412; *Manchester Assur. Co. v. Ellis*, 85 Ill. App. 634; *Stephens v. Union Assur. Soc.*, 16 Utah, 22, 50 Pac. Rep. 626, 27 Ins. L. J. 165; *Dobson v. Hartford Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456.

2. *Dover Glass Works v. American Ins. Co.*, 1 Marv. 32, 29 Atl. Rep. 1039, 24 Ins. L. J. (Del.) 12.

RULE 5.

Waiver as Affected by Construction of Two Classes of Conditions.

The courts are not so inclined to find circumstances of waiver of a forfeiture for violation of a condition in terms voiding the insurance, as they are of those which come into operation in event of a fire and are precedent to the loss becoming payable.

Hinman v. Hartford Ins. Co., 36 Wis. 159. And see *Sergeant v. Liverpool, L. & G. Ins. Co.*, 155 N. Y. 349, 49 N. E. Rep. 935. See also "Construction."

RULE 6.

Distinction Between Waiver and Estoppel.

There is a distinction between waiver and an estoppel. A waiver arises by the intentional relinquishment of a right, or by neglect to insist upon a right at the proper time, and does not imply any conduct or dealing by which the other party is induced to act or forbear to act to his disadvantage, while an estoppel necessarily presupposes some such conduct or dealing.

Metcalf v. Phoenix Ins. Co., 21 R. I. 307, 43 Atl. Rep. 541; *McCormick v. Orient Ins. Co.*, 86 Cal. 260. And see *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 633, 51 N. E. Rep. 392; *Germania Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. Rep. 921; *Watts v. Fire Assoc.*, 87 Mo. App. 83.

RULE 7.

Waiver is no Presumption of Law.

There is no presumption of law that an insurance company waives a provision intended for its protection.

Sisk v. Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. Rep. 804, 26 Ins. L. J. 369.

RULE 8.

Insured Bound by Limitations on Agent's Authority in Accepted Policy.

Assured is bound by limitations upon an agent's authority, contained in an accepted policy, and it makes no difference that his acts or declarations occur before or at time of its issue. The rule that contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, is applicable to cases of insurance

contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect in specified instances, without the knowledge and consent of the company, are usual and reasonable; it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that when fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture by non-observance of conditions; that, when waiver is relied upon, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

Northern Assur. Co. v. Grand View Building Assoc., 183 U. S. 308, 22 Sup. Ct. Rep. 133, revg. 101 Fed. Rep. 77, 41 C. C. A. 207.

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To same effect holding that knowledge of agent is not admissible, see *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Thomas v. Commercial Union Ins. Co.*, 162 Mass. 29, 37 N. E. Rep. 672; *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568; *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Bennett v. St. Paul F. & M. Ins. Co.*, 55 N. J. L. 377; *Liverpool, L. & G. Ins. Co. v. Richardson*, 11 Okla. 579, 69 Pac. Rep. 936; *Birmingham Ins. Co. v. Kroegher*, 83 Pa. St. 64; *Phoenix Ins. Co. v. Clay*, 101 Ga. 331, 28 S. E. Rep. 853; *Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. Rep. 266. And see *Westchester Ins. Co. v. Wagner*, 10 Tex. Civ. App. 398, 30 S. W. Rep. 959; *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473, 18 C. C. A. 203; *Roberts, Willis & Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. Rep. 955.

The doctrine that an insurance company is estopped by knowledge of its agent when policy issues, is, so far as the United States courts are concerned, substantially overruled by *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, revg. 101 Fed. Rep. 77, 41 C. C. A. 207.

The opinion of the United States Supreme Court criticizes the New York and other cases as practically evading the rule excluding parol testimony to contradict or alter written instruments. It approves the reasoning in *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568; *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Smith v. Insurance Co.*, 24 Pa. St. 320; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331. The opinion contains a valuable review of the cases, and suggests reformation in equity as being the proper remedy. It would seem, however, that the doctrine thus criticized and overruled is now too firmly established in the different States to be at once overthrown. (See Rule 16, and cases cited.)

It is significant that already the courts of two of the leading States—New York and Illinois—have rejected the case of *Northern Assur. Co. v. Grand View Bldg. Assoc.* as binding authority, and expressed adherence to the established rule. *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. Rep. 339; *Benjamin v. Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256, *affd.*, 177 N. Y. 588, on opinion below.

It has also lately been rejected in *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889; *Home Ins. Co. v. Nichols*, Tex. Civ. App. , 72 S. W. Rep. 440; *Welch v. Fire Assoc.*, Wis. , 98 N. W. Rep. 227; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, Va. , 46 S. E. Rep. 463; *German Ins. Co. v. Shader*, Nebr. , 93 N. W. Rep. 972.

It is adopted and followed in *Maupin v. Scottish Union & National Ins. Co.*, 53 W. Va. 557, 45 S. E. Rep. 1003, but rejected as affecting waiver or estoppel when policy issues. *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101. It is rejected in *German-American Ins. Co. v. Yeagley*, Ind. , 71 N. E. Rep. 897; *Hartford Ins. Co. v. Redding*, Fla. , 37 So. Rep. 62; *German-American Ins. Co. v. Yellow Poplar Lumber Co.* (Ky.), 84 S. W. Rep. 551.

RULE 9.

Limitation on Preceding Rule — Estoppel — Construction by Company's Agent.

Notwithstanding the limitation upon an agent's authority and powers contained in the policy, the insurance company may still be estopped by his knowledge, acts, and verbal consents, where the power of the agent has been enlarged by usage of the company, its course of business, or by its consent, express or implied, where the assured has acted in reliance upon the conduct of such agent, clothed thereby with apparent authority;¹ and where the agent has made written indorsement upon the policy, the company may be bound by his construction of its meaning.²

1. *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488, 496; *Lamberton v. Connecticut Ins. Co.*, 39 Minn. 129, 39 N. W. Rep. 76. And see *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415, 421; *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. Rep. 1024; *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55; *Mechanics' Assoc. v. Millville Ins. Co.*, 14 Vroom (N. J.), 652; *Ross Langford v. Mercantile Ins. Co.*, 97 Mo. App. 79, 71 S. W. Rep. 720; *Thompson v. Traders' Ins. Co.*, 169 Mo. 112, 68 S. W. Rep. 889; *Day v. Mechanics & Traders' Ins. Co.*, 88 Mo. 325; *Hanover Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. Rep. 772; *American Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. Rep. 931. Compare Rules 10, 12, 16, 27.

2. *Steen v. Niagara Ins. Co.*, 89 N. Y. 315; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 44 N. W. Rep. 1106.

RULE 10.

Same Subject — May be Evidence of Authority — Question of Fact.

Although the condition requiring written indorsement of a waiver excludes any inference that the

powers of the agent extend to the waiver of conditions in the policy except in the mode prescribed, yet it may be shown that such authority was in fact granted; and the waiver whether in writing or parol, when given by a duly authorized agent and acted upon by the insured, is, if sufficiently proved, binding upon the company. The condition in question puts the insured upon notice that the agent has no authority to waive conditions except in writing upon or attached to the policy, and the insured has no right to rely upon a waiver made in any other manner unless it can be shown that the company did in fact authorize the agent to make the waiver; otherwise insured would have to show that authority was expressly granted by the company in the given instance, or would have to show some previous course of dealing in similar cases by the agent, with the company's consent, manifested by ratification or otherwise.

Western Assur. Co. v. Williams, 94 Ga. 128, 21 S. E. Rep. 370; *Continental Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. Rep. 876; *Pollock v. German Ins. Co.*, 127 Mich. 460, 86 N. W. Rep. 1017; *McCabe v. Dutchess County Ins. Co.*, 14 Hun, 599; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31; *Morrison v. Insurance Co. of N. A.*, 69 Tex. 353, 6 S. W. Rep. 605.

RULE II.

Same Subject — Estoppel — Distinction.

The stipulation in a policy that no agent or other representative shall have power to waive any condition may be effective as against an alleged waiver by agreement or contract with an agent or representative, but

has no application when the law declares a waiver by estoppel because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power or lack of power of the agent to change the provisions of the policy or waive any of its agreements, but arise in law because of the acts of the company through its agent acting in the scope of his apparent power as its representative.

Dwelling-House Ins. Co. v. Dowdall, 55 Ill. App. 622; *Insurance Co. v. Sinsabaugh*, 101 Ill. App. 55.

RULE 12.

Same Subject — Limitation on Authority of Agent no Application to Inception of Contract Prior to its Delivery.

Restrictions in the policy upon power of agents to waive its conditions, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract when it appears that company's agent delivered it and received the premium with full knowledge of the actual situation.

Wood v. American Ins. Co., 149 N. Y. 382, 44 N. E. Rep. 80, affg. 78 Hun, 109, 29 N. Y. Supp. 250; *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477, 44 N. E. Rep. 159, affg. 79 Hun, 117, 29 N. Y. Supp. 513; *Swain v. Macon Ins. Co.*, 102 Ga. 96, 29 S. E. Rep. 147; *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kans. App. 377, 42 Pac. Rep. 738; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. Rep. 1078; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101. And see Rule 16.

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RULE 13.

Limitation to Certain Officer May be Waived.

A written provision of the policy that its conditions shall not be waived except by a certain officer of the company may itself be waived by parol.

Dale v. Continental Ins. Co., 95 Tenn. 38, 31 S. W. Rep. 266, 25 Ins. L. J. 10.

RULE 14.

Limitation of Authority no Application to Officers of Company.

The limitation in the policy upon the authority of agents to make a waiver otherwise than by indorsement or in writing has no application to an officer of the company, its president¹ or secretary.²

1. *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273; *Maryland Ins. Co. v. Gusdorf*, 43 Md. 506; *Universal Ins. Co. v. Stewart*, 3 Pennyp. (Pa.) 536.

2. *Stolle v. Aetna Ins. Co.*, 10 W. Va. 546; *Haas v. Montauk Ins. Co.*, 49 Hun, 272, citing *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Adams v. Greenwich Ins. Co.*, 9 Hun, 45, *affd.*, 70 N. Y. 166. And see *Morrison v. Insurance Co. of N. A.*, 69 Tex. 353, 6 S. W. Rep. 605; *Hanover Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. Rep. 772.

RULE 15.

Waiver May be Effective Though not in Mode Specified.

The clause limiting the powers of agents or officers to waive breaches of conditions except in a certain manner is inoperative, where a waiver has been made other than that specified in the policy.

American Ins. Co. v. First Nat. Bank, 73 Miss. 469, 18 So. Rep. 931. And see *Lutz v. Anchor Ins. Co.*, 120 Iowa, 136, 94 N. W. Rep. 274.

RULE 16.

Issue and Delivery of Policy with Knowledge of Facts — Burden of Proof.

Issue and delivery of a policy with knowledge by the company or its agent of existing facts, which by its terms or conditions would render it void, operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such facts;¹ and the same rule applies to a renewal;² but the burden of proof of such knowledge rests upon the assured and plaintiff.³

1. *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. Rep. 655; *Swaine v. Macon Ins. Co.*, 102 Ga. 96, 29 S. E. Rep. 147; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. Rep. 1078; *Manufacturers' Ins. Co. v. Armstrong*, 145 Ill. 469; *Hartford Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. Rep. 685; *Continental Fire Assoc. v. Morris*, 30 Tex. Civ. App. 299, 70 S. W. Rep. 769; *O'Brien v. Greenwich Ins. Co.*, 95 Mo. App. 301, 68 S. W. Rep. 976; *Trundle v. Providence-Washington Ins. Co.*, 54 Mo. App. 188; *Barnard v. National Ins. Co.*, 38 Mo. App. 106; *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. Rep. 833; *Hamilton v. Dwelling-House Ins. Co.*, 98 Mich. 535, 57 N. W. Rep. 735; *Gray v. Germania Ins. Co.*, 155 N. Y. 180, 184; *Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392, *affd.* without opinion, 162 N. Y. 639; *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748; *Benjamin v. Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720, 33 So. Rep. 500; *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653; *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356, 30 So. Rep. 496; *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163; *Danvers Ins. Co. v. Schertz*, 95 Ill. App. 656; *American Central Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. Rep. 249; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348; *Burson v. Fire Assoc.*, 136 Pa. St. 267; *West v. Norwich Union Ins. Soc.*, 10 Utah, 442; *Osborne v. Phoenix Ins. Co.*, 23 Utah, 428, 64 Pac. Rep. 1103; *Carroll v. Charter Oak Ins. Co.*, 1 Abb.

Ct. App. Dec. 316; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Couch v. Rochester German Ins. Co.*, 25 Hun, 469; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450; *Spalding v. New Hampshire Ins. Co.*, 71 N. H. 441, 52 Atl. Rep. 858; *Liverpool, L. & G. Ins. Co. v. Ende*, 65 Tex. 118; *Mulville v. Adams*, 19 Fed. Rep. 887; *Depuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680; *Insurance Co. v. Brodie*, 52 Ark. 11; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Hornthall v. Western Ins. Co.*, 88 N. C. 71; *Brodhead v. Lycoming Ins. Co.*, 23 Hun, 397; *Woodward v. Republic Ins. Co.*, 32 Hun, 365; *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389; *Home Ins. Co. v. Garfield*, 60 Ill. 124; *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174; *Soli v. Farmers' Ins. Co.*, 51 Minn. 24, 52 N. W. Rep. 979; *Anderson v. Manchester Ins. Co.*, 59 Minn. 182, 64 N. W. Rep. 241; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. Rep. 185; *Martin v. Fidelity Ins. Co.*, 119 Iowa, 570, 93 N. W. Rep. 562; *Brenner v. Connecticut Ins. Co. (Mo. App.)*, 74 S. W. Rep. 406; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. Rep. 562; *Planters' Ins. Co. v. Thurston*, 93 Ala. 255; *Dwelling-House Ins. Co. v. Gould*, 134 Pa. St. 570; *Rissler v. Insurance Co.*, 150 Mo. 366; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Day v. Mechanics' Ins. Co.*, 88 Mo. 325; *Murphy v. New York Bowery Ins. Co.*, 62 Mo. App. 495; *City of De Soto v. American Guardian Ins. Co. (Mo. App.)*, 74 S. W. Rep. 1; *Liverpool, L. & G. Ins. Co. v. McGuire*, 52 Miss. 227; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. Rep. 183; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Hadley v. Insurance Co.*, 55 N. H. 110; *Richards v. Washington Ins. Co.*, 60 Mich. 420; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Harri-man v. Queen Ins. Co.*, 49 Wis. 71; *Imperial Ins. Co. v. Shimer*, 96 Ill. 580; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133; *Richmond v. Niagara Ins. Co.*, 79 N. Y. 230; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *American Cent. Ins. Co. v. McLanathan*, 11 Kans. 533; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Germania Ins. Co. v. McKee*, 94 Ill. 494; *City Ins. Co. v. Carrugi*, 41 Ga. 660; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. (U. S. Cir.) 368; *Story v. Hope Ins. Co.*, 37 La. Ann. 254; *Reiner v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. Rep. 208; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625; *German Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. Rep. 792; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. Rep. 915; *Bennett v. North B. & M. Ins. Co.*, 81 N. Y. 273; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Kings*

County Ins. Co. *v.* Swigert, 11 Ill. App. 590; Cone *v.* Niagara Ins. Co., 60 N. Y. 619; Short *v.* Home Ins. Co., 90 N. Y. 16; Hotchkiss *v.* Home Ins. Co., 58 Wis. 297; Dunbar *v.* Phoenix Ins. Co., 72 Wis. 492, 40 N. W. Rep. 386; Monk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. Rep. 837, 18 Pac. Rep. 117; Continental Ins. Co. *v.* Pearce, 39 Kans. 396, 18 Pac. Rep. 291; Pickels *v.* Phoenix Ins. Co., 119 Ind. 291, 21 N. E. Rep. 898; Phoenix Ins. Co. *v.* Copeland, 86 Ala. 551, 6 So. Rep. 143; Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. Rep. 415; Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. Rep. 77; Stone *v.* Hawkeye Ins. Co., 68 Iowa, 737; Home Ins. Co. *v.* Lewis, 48 Tex. 622.

2. Allen *v.* Home Ins. Co., 133 Cal. 29, 65 Pac. Rep. 138; Whited *v.* Germania Ins. Co., 76 N. Y. 415; Stage *v.* Home Ins. Co., 76 App. Div. 509, 78 N. Y. Supp. 555; Liddle *v.* Market Ins. Co., 4 Bosw. 179, affd., 29 N. Y. 184; Witherell *v.* Maine Ins. Co., 49 Me. 200; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402; New England Ins. Co. *v.* Wetmore, 32 Ill. 221; Shearman *v.* Niagara Ins. Co., 46 N. Y. 526; Ludwig *v.* Jersey City Ins. Co., 48 N. Y. 379; State Ins. Co. *v.* Todd, 83 Pa. St. 272; Robinson *v.* Pacific Ins. Co., 18 Hun, 395; Kruger *v.* Western Ins. Co., 72 Cal. 91, 13 Pac. Rep. 156; Cary *v.* Home Ins. Co., 97 Iowa, 619, 66 N. W. Rep. 920.

3. Wierengo *v.* American Ins. Co., 98 Mich. 621, 57 N. W. Rep. 833.

RULE 17.

Knowledge of Facts Acquired Previously.

While knowledge of facts acquired previously by an agent of the company may be operative on a question of estoppel,¹ such knowledge must be present in his mind at time of the issue of the policy;² the company is not chargeable where the knowledge of the agent was independently acquired in course of a previous employment not connected with his agency.³

1. Brodhead *v.* Lycoming Ins. Co., 23 Hun, 397; Wilson *v.* Minnesota Ins. Assoc., 36 Minn. 117; Couch *v.* Rochester German Ins. Co., 25 Hun, 469; Clark *v.* Union Ins. Co., 40 N. H. 333.

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2. *Sergeant v. Liverpool, L. & G. Ins. Co.*, 66 App. Div. 46, 73 N. Y. Supp. 120; *Sterrett v. Pennsylvania Ins. Co.*, 68 Iowa, 674.

3. *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. Rep. 240; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204.

RULE 18.

Must be Actual Knowledge — Constructive Notice — Public Records.

The knowledge on part of an insurance company of facts constituting a breach of a condition in the policy at time of its issue must be actual knowledge; the doctrine of constructive notice has no application and the company is not chargeable with notice or knowledge of what appears on public records.

Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. Rep. 560; *Traders' Ins. Co. v. Cassell*, 24 Ind. App. 238, 56 N. E. Rep. 259; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404.

RULE 19.

Estoppel Does not Always Depend on Actual Knowledge when Policy Issues — Sufficient if Company Put upon Inquiry.

Waiver or estoppel by reason of knowledge of facts when policy issues does not always necessarily depend upon actual knowledge; it is sufficient if the company or its authorized agent was put upon inquiry, and if he neglects to make it he is chargeable with knowledge.

Skinner v. Norman, 165 N. Y. 565, 59 N. E. Rep. 309. And see *Farmers' Ins. Co. v. Lecroy*, 91 Ill. App. 41.

RULE 20.

Knowledge of Insured's Intention to do Something in Future no Estoppel — Oral Promise and Opinion by Agent.

Where policy issues with knowledge by the company's agent of an intention on part of the assured to

do something thereafter or in the future which would require written indorsement or consent, the insured is not thereby relieved of the necessity of procuring it;¹ nor does an oral promise or undertaking by the agent for the future operate as an estoppel or waiver;² nor an expression of an opinion by the agent that "it will be all right;"³ nor the understanding of the assured.⁴

1. *Gray v. Germania Ins. Co.*, 155 N. Y. 180, 49 N. E. Rep. 675; *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239; *Bourgeois v. Northwestern National Ins. Co.*, 86 Wis. 606, 57 N. W. Rep. 347; *Hartford Ins. Co. v. Davenport*, 37 Mich. 609; *Sowers v. Mutual Ins. Co.*, 113 Iowa, 551, 85 N. W. Rep. 763; *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446, 62 S. W. Rep. 89; *Liverpool, L. & G. Ins. Co. v. Sorsby*, 60 Miss. 302. And see *Eagle Fire Co. v. Globe Loan Co.*, 44 Nebr. 380, 62 N. W. Rep. 895, 24 Ins. L. J. 615.

2. *Cornelius v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. Rep. 1037; *Keller v. Liverpool, L. & G. Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. Rep. 695, writ of error denied; *Hartford Ins. Co. v. Webster*, 69 Ill. 392.

3. *Bosworth v. Merchants' Ins. Co.*, 80 Wis. 393.

4. *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473, 18 C. C. A. 203.

RULE 21.

Rule as to Estoppel when Policy Issues no Application to Future Acts or Omissions.

The doctrine of estoppel or waiver arising from knowledge of facts when policy issues has no application to future acts or omissions to comply with agreements or warranties,¹ but may operate to extent of allowing the assured a reasonable time to keep his agreement or warranty;² and a company may be bound by the construction of its agent,³ but not by mere understanding of the parties.⁴

1. *England v. Westchester Ins. Co.*, 81 Wis. 583; *Hartford Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. Rep. 140.

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2. *Hartford Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. Rep. 140.

3. *Farmers' Ins. Assoc. v. Williams*, 95 Va. 248, 28 S. E. Rep. 214.

4. *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473, 18 C. C. A. 203.

RULE 22.

Effect of Promise by Agent to Make Indorsement on Policy to which He has Access in Possession of a Third Party — Exception.

Where there is an express promise by an authorized agent of the company to make the indorsement in writing required upon a policy to which he had access in hands of a third person, and not under the assured's control, his failure to perform such promise operates as an equitable estoppel.¹ But this rule has no application when policy is in possession or under control of the assured;² even if locked up in a safe.³

1. *Manchester v. Guardian Ins. Co.*, 151 N. Y. 88, 45 N. E. Rep. 381. And see *Henschel v. Oregon Ins. Co.*, 4 Wash. 476, 30 Pac. Rep. 735, rehearing denied, 4 Wash. 483, 31 Pac. Rep. 765.

2. *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Connecticut Ins. Co. v. Smith*, 10 Colo. App. 121; *Tompkins v. Hartford Ins. Co.*, 22 App. Div. 380.

3. *Northam v. Dutchess County Ins. Co.*, 166 N. Y. 319.

RULE 23.

Authority of Soliciting Agents.

An agent authorized by the insurance company to solicit the insurance, and to make the application, deliver the policy, and collect the premium, has authority, notwithstanding limitations upon it not known to the assured, to create an estoppel by his knowledge of the facts when the policy is issued and delivered through

and by him as the company's agent;¹ but such an agent cannot waive conditions and forfeitures.²

1. *Bush v. Missouri Ins. Co.*, 85 Mo. App. 155, citing *Williams v. Insurance Co.*, 73 Mo. App. 607; *Rickey v. Insurance Co.*, 79 Mo. App. 485; *James v. Insurance Co.*, 148 Mo. 1; *Springfield Steam Co. v. Insurance Co.*, 151 Mo. 90, overruling *Jenkins v. Insurance Co.*, 58 Mo. App. 210; *Shoup v. Insurance Co.*, 51 Mo. App. 287. And see *Ormsby v. Laclede Ins. Co.*, 105 Mo. App. 143, 72 S. W. Rep. 139; *Partridge v. Commercial Ins. Co.*, 17 Hun, 95; *Mead v. Saratoga Ins. Co.*, 81 App. Div. 282, 80 N. Y. Supp. 885; *Hayes v. Saratoga Ins. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888; *Arff v. Star Ins. Co.*, 125 N. Y. 57, 66, 25 N. E. Rep. 1073; *Spalding v. New Hampshire Ins. Co.*, 71 N. H. 441, 52 Atl. Rep. 858; *Krum v. Jefferson Ins. Co.*, 40 Ohio St. 225; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720, 33 So. Rep. 500; *Phoenix Ins. Co. v. Phillips*, 16 Ky. L. Rep. 122; *Fidelity Ins. Co. v. Lowe*, Nebr., 93 N. W. Rep. 749; *Wich v. Equitable Ins. Co.*, 2 Colo. App. 484, 31 Pac. Rep. 389; *State Ins. Co. v. Latourette (Ark.)*, 74 S. W. Rep. 300.

2. *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. Rep. 952; *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163.

As to distinction between "Waiver" and "Estoppel," see Rule 6.

RULE 24.

Same Subject — Estoppel — Written Application.

An insurance company is estopped by the errors and mistakes of its soliciting agent, having knowledge of the facts, in making or filling up a written application for the policy.

Dwelling-House Ins. Co. v. Dowdall, 55 Ill. App. 622, affd., 159 Ill. 179, 42 N. E. Rep. 606; *Creed v. Sun Fire Office*, 101 Ala. 522, 14 So. Rep. 323; *German-American Ins. Co. v. Hart*, 43 Nebr. 441, 61 N. W. Rep. 582; *Fidelity Ins. Co. v. Lowe*, Nebr., 93 N. W. Rep. 749; *Home Ins. Co. v. Fallon*, 45 Nebr. 554, 63 N. W. Rep. 860; *Landes v. Safety Ins. Co.*, 190 Pa. St. 536, 42 Atl. Rep. 961; *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. Rep. 453; *Ross-Langford v. Mercantile*

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Ins. Co., 97 Mo. App. 79, 71 S. W. Rep. 720; *Partridge v. Commercial Ins. Co.*, 17 Hun, 95. And see *Arff v. Star Ins. Co.*, 125 N. Y. 57, 66, 25 N. E. Rep. 1073; *Mead v. Saratoga Ins. Co.*, 81 App. Div. 282, 80 N. Y. Supp. 885; *Hayes v. Saratoga Ins. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888.

RULE 25.

Error in Application — Estoppel — Parol Evidence.

Where it is claimed by the insured that an error of description in the application and in the policy was made by the company's agent, evidence to establish such fact is admissible where it is relied upon to show an estoppel; the rule excluding parol evidence to vary or contradict a written contract has no application to such a case.

Glover v. National Ins. Co., 85 Fed. Rep. 125, 42 U. S. App. 728, 27 Ins. L. J. 678.

RULE 26.

Power of Agents to Employ Clerks — Their Authority.

A local or general agent having authority to make and issue policies for an insurance company, and to consent to transfers, changes, and indorsements, etc., has power to employ clerks to discharge the ordinary business of the agency, and a waiver of the character which the agent himself could make, is to be attributed to him when made by his clerk,¹ but his authority will not be assumed, and there must be some proof of his relations to the insurance company or its agent and business.²

1. *Arff v. Star Ins. Co.*, 125 N. Y. 57, 25 N. E. Rep. 1073. And see *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Grady v. American Central Ins. Co.*, 60 Mo. 116; *Deitz v. Providence-Washington Ins. Co.*, 33 W. Va. 526, 11 S. E. Rep. 50; *Chase*

v. People's Ins. Co., 14 Hun, 456; *Kuney v. Amazon Ins. Co.*, 36 Hun, 66.

2. *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55; *Arff v. Star Ins. Co.*, 125 N. Y. 57, 25 N. E. Rep. 1073.

RULE 27.

Limitation on Agent's Authority in Policy, Operative After its Issue.

Where the only evidence of authority of the agent is that contained in the policy, it operates as a limitation upon his powers and he cannot orally waive its conditions or consent to any change after issue of the policy;¹ but rule is otherwise when the policy does not contain any limitation upon the agent's authority.²

1. *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; *Messelbach v. Norman*, 122 N. Y. 578; *Woodside Brewing Co. v. Pacific Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620, *affd.* on opinion below, 159 N. Y. 549; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Moore v. Hanover Ins. Co.*, 141 N. Y. 219; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Parker v. Rochester German Ins. Co.*, 162 Mass. 479; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. Rep. 18; *Burr v. German Ins. Co.*, 84 Wis. 76, 54 N. W. Rep. 22; *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510; *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 77 N. W. Rep. 752; *West End Hotel v. American Ins. Co.*, 74 Fed. Rep. 114; *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 71 Mich. 414; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302; *Hill v. London Assur. Co.*, 16 Daly, 120, 9 N. Y. Supp. 500, 12 N. Y. Supp. 86, 26 Abb. N. C. 203; *Hawkins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. Rep. 34; *Wilkins v. State Ins. Co.*, 43 Minn. 177, 45 N. W. Rep. 1; *Burlington Ins. Co. v. Gibbons*, 43 Kans. 15, 22 Pac. Rep. 1010; *Weidert v. State Ins. Co.*, 19 Oreg. 261, 24 Pac. Rep. 242; *Meyers v. Germania Ins. Co.*, 27 La. Ann. 63; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461; *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 3 N. E. Rep. 884, 144 Mass. 43; *German Ins. Co. v. Heiduk*, 30 Nebr. 288.

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46 N. W. Rep. 481; *State Ins. Co. v. Hale*, Nebr., 95 N. W. Rep. 473; *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547, 32 N. E. Rep. 990; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 38, 31 N. E. Rep. 265; *Gladdings v. Insurance Assoc.*, 66 Cal. 6; *Girard Ins. Co. v. Hebard*, 95 Pa. St. 45; *New v. German Ins. Co.*, 5 Ind. App. 82, 31 N. E. Rep. 475; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Carlin v. Western Assur. Co.*, 57 Md. 515; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. Rep. 547.

2. *Millville Ins. Co. v. Mechanics' Building & Loan Assoc.*, 43 N. J. L. 652.

RULE 28.

Same Subject—Limitation to Preceding Rule.

In many of the States the rule is that notwithstanding limitation upon the agent's authority contained in an issued or delivered policy, he may still orally consent to a modification or change in its terms, and that same need not be evidenced in writing, or by written indorsement;¹ but such an agent should have general authority to make, change, modify, and cancel policies;² and there should be some element of estoppel;³ an oral consent cannot be given by a removed agent.⁴

1. *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. Rep. 339, affg. 96 Ill. App. 525; *Niagara Ins. Co. v. Brown*, 123 Ill. 356; *Illinois Ins. Co. v. Stanton*, 57 Ill. 354; *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85; *Westchester Ins. Co. v. Earle*, 33 Mich. 143; *Minnock v. Eureka Ins. Co.*, 90 Mich. 236, 51 N. W. Rep. 367; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 24 Ins. L. J. 154, 38 N. E. Rep. 835; *German Ins. Co. v. Gray*, 43 Kans. 497, 23 Pac. Rep. 637; *Home Ins. Co. v. Gaddis*, 3 Ky. L. Rep. 159; *Home Ins. Co. v. Nichols*, Tex. Civ. App., 72 S. W. Rep. 440; *Ætna Ins. Co. v. Eastman*, Tex. Civ. App., 80 S. W. Rep. 255, rehearing denied and writ of error denied by Supreme Court; *Phoenix Ins. Co. v. Grove*, Ill., 74 N. E. Rep. 141.

2. *Liverpool, L. & G. Ins. Co. v. Sheffy*, 71 Miss. 919; *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889; *Grubbs v. North Carolina Ins. Co.*, 108 N. C. 472; *Morrison v. Insur-*

ance Co. of N. A., 69 Tex. 353; *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419; *Phoenix Ins. Co. v. Public Parks' Amusement Co.*, 63 Ark. 187; *Highlands v. Lurgan Mut. Ins. Co.*, 177 Pa. St. 566, 35 Atl. Rep. 728; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352; *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85.

3. *Equitable Ins. Co. v. Cooper*, 60 Ill. 509; *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835. As to distinction between waiver and estoppel, see Rules 6, 11. And see "Construction."

4. *Burlington Ins. Co. v. Campbell*, 42 Nebr. 208, 60 N. W. Rep. 599.

RULE 29.

Test of Authority of Agent as Bearing on a Question of Waiver.

If knowledge of an agent or an oral waiver by him is to be imputed to the company, it should be that of an agent authorized to bind the company in the transaction concerning which the knowledge or declaration is to operate as a waiver.

Martin v. Jersey City Ins. Co., 44 N. J. L. 273. And see *West v. Norwich Union Ins. Co.*, 10 Utah, 442, 37 Pac. Rep. 685; *Continental Fire Assoc. v. Morris*, 30 Tex. Civ. App. 299, 70 S. W. Rep. 769. And see vol. 2, "Agents."

RULE 30.

Effect of Failure to Cancel and Return Unearned Premium.

If the company or an authorized agent has or acquires knowledge of facts making policy void, after its issue, failure to cancel and return the unearned premium may, in connection with other facts, afford evidence of a waiver or an estoppel;¹ but not when the policy remains valid under operation of a mortgagee clause.²

1. *Phoenix Ins. Co. v. Grove*, Ill. , 74 N. E. Rep. 141; *German-American Ins. Co. v. Harper*, Ark. , 86 S. W. Rep. 817; *Turner v. Providence-Washington Ins. Co.*, 86 Mo. App. 387; *Millis v. Scottish Union & Nat. Ins. Co.*, 95 Mo. App. 211, 68 S. W. Rep. 1066; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889; *Pollock v. German Ins. Co.*, 127 Mich. 460,

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86 N. W. Rep. 1017; *Rauch v. Michigan Millers' Ins. Co.*, 131 Mich. 281, 91 N. W. Rep. 160; *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 N. E. Rep. 633; *Hanover Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. Rep. 772; *Fireman's Fund Ins. Co. v. Congregation Sholom*, 80 Ill. 558; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453; *Illinois Ins. Co. v. Stanton*, 57 Ill. 354; *North British & M. Ins. Co. v. Steiger*, 26 Ill. App. 228, *affd.*, 124 Ill. 81, 16 N. E. Rep. 95; *Phoenix Ins. Co. v. Boyer*, 1 Ind. App. 329, 27 N. E. Rep. 628; *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65. And see *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580, 46 Atl. Rep. 777; *Commercial Assur. Co. v. New Jersey Rubber Co.*, 61 N. J. Eq. 446, 49 Atl. Rep. 155; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835; *Kalmitz v. Northern Ins. Co.*, 186 Pa. St. 571, 40 Atl. Rep. 816; *Phoenix Ins. Co. v. Corey*, 41 Nebr. 724, 60 N. W. Rep. 12; *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. Rep. 810; *Kahler v. Insurance Co.*, 106 Iowa, 380.

2. *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. Rep. 149. And that company is not estopped by mere failure to cancel, see also *Norris v. Hartford Ins. Co.*, 55 S. C. 450, 33 S. E. Rep. 566, 28 Ins. L. J. 747; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. Rep. 547; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295.

RULE 31.

Effect of Payment of Premium and Receipt Therefor After Issue of Policy.

Where assured, upon delivery of the policy, pays a part only of the premium, and afterward pays the balance to an authorized agent of the company who has knowledge of facts constituting a forfeiture, and who gives a receipt therefor, with verbal assurance that it is all right, and that policy would continue, it operates as an equitable estoppel, specially when it might be found as a fact that the receipt was given to be added or attached to the policy.

Northam v. International Ins. Co., 45 App. Div. 177, 61 N. Y. Supp. 45, *affd.* on opinion below, 165 N. Y. 666. And see *Northam v. Dutchess Ins. Co.*, 166 N. Y. 319, 324.

RULE 32.

Effect of Written Consent Held for Insured by Agent — Effect of His Statement.

A written consent by the company or its agent, agreed upon and actually made out and held for the insured, who is to call for it, is valid though not actually attached to the policy until after the fire occurring a few days later;¹ and so a statement by the agent that a necessary permit had been attached to the policy may operate as an estoppel.²

1. *Bennett v. Western Underwriters' Assoc.*, 130 Mich. 216, 89 N. W. Rep. 702.

2. *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40.

RULE 33.

Effect of Written Indorsement for Another Purpose.

A written indorsement by an authorized agent of the company for a specific or another distinct purpose, recognizing and continuing the policy as in force with knowledge of facts constituting a forfeiture, operates as a waiver or an estoppel.

Stuart v. Reliance Ins. Co., 179 Mass. 434, 60 N. E. Rep. 929; *Phoenix Ins. Co. v. Public Parks' Amusement Co.*, 63 Ark. 187; *Nebraska Ins. Co. v. Sasek*, 64 Nebr. 17, 89 N. W. Rep. 428; *Hunt v. State Ins. Co.*, 66 Nebr. 121, 92 N. W. Rep. 921; *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392; *Ladd v. Aetna Ins. Co.*, 70 Hun, 490, *affd.*, 147 N. Y. 478; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526; *Solmes v. Rutgers Ins. Co.*, 3 Keyes (N. Y.), 416; *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa, 193; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570; *Oakes v. Manufacturers' Ins. Co.*, 135 Mass. 248; *Bonenfant v. American Ins. Co.*, 76 Mich. 653, 43 N. W. Rep. 682; *Batchelor v. People's Ins. Co.*, 40 Conn. 56; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523.

RULE 34.

Waiver by Treating Policy as in Force After a Fire.

Where there has been a breach of condition, company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the assured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled that such a waiver need not be based upon any new agreement or an estoppel.

Titus v. Glens Falls Ins. Co., 81 N. Y. 410; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. Rep. 475; *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392, revg. 89 Hun, 333, 35 N. Y. Supp. 374; *Roby v. American Central Ins. Co.*, 120 N. Y. 510, 24 N. E. Rep. 808; *Hanover Ins. Co. v. Bohn*, 48 Nebr. 743, 67 N. W. Rep. 774, 25 Ins. L. J. 681; *Home Ins. Co. v. Kuhlman*, 58 Nebr. 488, 78 N. W. Rep. 936; *Montgomery v. Delaware Ins. Co.*, 55 S. C. 1, 32 S. E. Rep. 723; *Graham v. American Ins. Co.*, 48 S. C. 195, 26 S. E. Rep. 323; *Dick v. Equitable Ins. Co.*, 92 Wis. 46, 65 N. W. Rep. 742; *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. Rep. 947; *Manu-*

facturers & Mer. Ins. Co. *v.* Armstrong, 145 Ill. 469, 34 N. E. Rep. 553; Granger *v.* Manchester Assur. Co., 119 Mich. 177; Carpenter *v.* Continental Ins. Co., 61 Mich. 635; Cobbs *v.* Fire Assoc., 68 Mich. 463; Hollis *v.* State Ins. Co., 65 Iowa, 454; Grubbs *v.* North Carolina Ins. Co., 108 N. C. 472, 13 S. E. Rep. 236; Haas *v.* Montauk Ins. Co., 49 Hun, 272; German Ins. Co. *v.* Gibson, 53 Ark. 494, 14 S. W. Rep. 672; Insurance Co. *v.* Norton, 96 U. S. 234; Hartford Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. Rep. 779; Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. Rep. 537; Dolan *v.* Missouri Ins. Co., 88 Mo. App. 666; Jerdee *v.* Cottage Grove Ins. Co., 75 Wis. 345; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. Rep. 208; Germania Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. Rep. 921; Planters' Ins. Co. *v.* Lloyd, 67 Ark. 584, 56 S. W. Rep. 44; Westchester Ins. Co. *v.* McAdoo, 57 S. W. Rep. 409, *affd.* orally by Supreme Court (Tenn.), 412; Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. Rep. 366; Stauffer *v.* Manheim Ins. Co., 150 Pa. St. 531, 24 Atl. Rep. 754, 21 Ins. L. J. 1051; Lutz *v.* Anchor Ins. Co., 120 Iowa, 136, 94 N. W. Rep. 274; Couch *v.* Home Protection Ins. Co. (Tex. Civ. App.), 73 S. W. Rep. 1077; Brown *v.* Commercial Ins. Co., 21 App. D. C. 325; Nugent *v.* Rensselaer Ins. Co., App. Div., 94 N. Y. Supp. 605.

RULE 35.

Same Subject — Limitation on Preceding Rule.

The insurance company may point out to the insured those conditions precedent to loss becoming due and payable, which he has contracted to perform, or object to statement furnished as not being in compliance therewith without making any demand in recognition of the validity of the policy. There is a distinction between those conditions which become operative only on *request* of the company and those which the assured has contracted to perform. A company can require performance by the insured after a fire of those conditions which he has contracted to perform and which are essential to his cause of action and preliminary to the assertion of any claim, without a waiver of its right under the contract, provided the insured

is not misled or required to do something that he did not agree to do.

Armstrong v. Agricultural Ins. Co., 130 N. Y. 560, distinguishing *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Betcher v. Capital Ins. Co.*, 78 Minn. 340, 80 N. W. Rep. 971; *Freedman v. Providence-Washington Ins. Co.*, 175 Pa. St. 355, 34 Atl. Rep. 730; *Wheaton v. Insurance Co.*, 76 Cal. 415; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Boyd v. Insurance Co.*, 90 Tenn. 212, 16 S. W. Rep. 470; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; *Niagara Ins. Co. v. Miller*, 120 Pa. St. 504, 516, 14 Atl. Rep. 385; *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335; *Rundell & Hough v. Anchor Ins. Co.*, Iowa, , 101 N. W. Rep. 517. See Rule 57.

RULE 36.

Forfeitures not Favored — Estoppel.

Forfeitures are not favored in the law, and the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or any agreement to do so upon which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the company from insisting upon the forfeiture.

Hartford Ins. Co. v. Unsall, 144 U. S. 439, 21 Ins. L. J. 439, 12 Sup. Ct. Rep. 671; *Spoeri v. Massachusetts Ins. Co.*, 39 Fed. Rep. 752. And see *Home Ins. Co. v. Feyerabend*, 7 Kans. App. 231, 52 Pac. Rep. 899.

RULE 37.

Effect of Officer or Agent Acting in Ignorance of What Others Know or Have Done or Said.

While an officer or agent may act in ignorance of what other agents know, or have done or said, that does not necessarily prevent the question of a waiver

becoming one of fact;¹ knowledge of a local agent who issued the policy is imputed to the company as knowledge of the same fact;² but ordinarily to establish a waiver of a forfeiture there should be knowledge by the person or party by whom it is claimed the forfeiture was waived.³

1. *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392; *Lewis v. Guardian Assur. Co.*, 181 N. Y. 392, 74 N. E. Rep. 224.

2. *Dick v. Equitable Ins. Co.*, 92 Wis. 46, 65 N. W. Rep. 742, 25 Ins. L. J. 449. And see *Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. Rep. 944.

3. *Weed v. London & Lancashire Ins. Co.*, 116 N. Y. 106, 22 N. E. Rep. 229; *Gray v. Guardian Assur. Co.*, 82 Hun, 380. See and compare Rules 40 and 41.

RULE 38.

In Absence of Express Waiver there Must be Some Elements of Estoppel — Silence.

In the absence of an express waiver at least some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could only be done by virtue of the policy or have required something of the assured, which he was bound to do only under a valid policy, or have exercised a right which it had only by virtue of such policy. Such an estoppel or waiver must be established by the person claiming it by a preponderance of evidence, and neither an estoppel nor waiver of the breach of a condition after forfeiture, by reason thereof, can be inferred from mere silence or inaction.

Gibson Electric Co. v. Liverpool & L. & G. Ins. Co., 159 N. Y. 418, 54 N. E. Rep. 23, affg. 10 App. Div. 225; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *Sun Mutual Ins. Co. v.*

Dudley, 65 Ark. 240, 28 Ins. L. J. 44; *Fournier v. German-American Ins. Co.*, 23 R. I. 36, 49 Atl. Rep. 98; *Weidert v. State Ins. Co.*, 19 Oreg. 261, 24 Pac. Rep. 242; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295. And see *Mueller v. Southside Ins. Co.*, 87 Pa. St. 399; *How v. Union Ins. Co.*, 80 N. Y. 32; *Ervay v. Fire Assoc.*, 119 Iowa, 304, 93 N. W. Rep. 290; *Sun Ins. Co. v. Dudley*, 65 Ark. 240. And see *Young v. St. Paul F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. Rep. 681; *Perry v. Caledonian Ins. Co.*, App. Div. , 93 N. Y. Supp. 50.

RULE 39.

When Silence May be an Element of Estoppel.

Silence operates as an assent and creates an estoppel only when it has the effect to mislead. There must be such conduct on the part of the insurer as would, if it were not estopped, operate as a fraud on the party who has taken or neglected to take some action to his own prejudice in reliance upon it. When under duty to speak, or when failure to speak is inconsistent with honest dealing and misleads another, then silence may be deemed to be acquiescence.

More v. New York Bowery Ins. Co., 130 N. Y. 537; *Rauch v. Michigan Millers' Ins. Co.*, 131 Mich. 281, 91 N. W. Rep. 160.

RULE 40.

Waiver Dependent on Intention — May be Inferred.

While waiver may be inferred from acts and declarations of the insurance company¹ it is essentially a matter of intention, and to establish it there must be some declaration or act from which the insured may reasonably infer that the company does not mean to insist upon a right which, because of a change of position induced thereby, it would be inequitable to enforce;² waiver involves the idea of assent, and assent is primarily an act of the understanding. It is the inten-

tional relinquishment of a known right; such intention may be inferred from company's acts and declarations, although waiver is not actually intended where the assured acts on such belief and is justified in so believing.³

1. *Westchester Ins. Co. v. McAdoo*, 57 S. W. Rep. 409, *affd.* orally by Supreme Court (Tenn.), 412.

2. *Freedman v. Providence-Washington Ins. Co.*, 175 Pa. St. 350, 34 Atl. Rep. 730; *Freedman v. Fire Assoc.*, 168 Pa. St. 249, 32 Atl. Rep. 39, 25 Ins. L. J. 74; *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 168; *Donahue v. Windsor Ins. Co.*, 56 Vt. 374; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. Rep. 240.

3. *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. Rep. 324, 27 Ins. L. J. 19; *United Firemen's Ins. Co. v. Thomas*, 82 Fed. Rep. 406, 27 C. C. A. 42, 53 U. S. App. 517; *Findeisen v. Metropole Ins. Co.*, 57 Vt. 520; *Astrich v. German-American Ins. Co.*, 131 Fed. Rep. 13, C. C. A. , *affg.* 128 Fed. Rep. 477.

RULE 41.

Knowledge Essential Element of Waiver.

The insurance company cannot waive that which it does not know; knowledge of the facts or of the right is an essential element of waiver.

Georgia Home Ins. Co. v. Rosenfield, 95 Fed. Rep. 358, 37 C. A. 96; *Firemen's Fund Ins. Co. v. McGreevy*, 118 Fed. Rep. 415; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. Rep. 915, 25 Ins. L. J. 833; *Freedman v. Fire Assoc.*, 168 Pa. St. 249, 32 Atl. Rep. 39, 25 Ins. L. J. 74; *Robinson v. Ætna Ins. Co. (Ala.)*, 34 So. Rep. 18; *United States Ins. Co. v. Moriarty (Tex.)*, 36 S. W. Rep. 943; *Cottome v. National Ins. Co.*, 65 Kans. 511, 70 Pac. Rep. 357; *Manufacturers & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. Rep. 553; *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. Rep. 947; *German-American Ins. Co. v. Waters*, 10 Tex. Civ. App. 363, 30 S. W. Rep. 576; *Planters' Ins. Co. v. Lloyd*, 67 Ark. 584, 56 S. W. Rep. 44; *Dick v. Equitable Ins. Co.*, 92 Wis. 46, 65 N. W. Rep. 742, 25 Ins. L. J. 449; *Ryan v. Springfield Ins. Co.*, 46 Wis. 671; *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 168;

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Gray v. Guardian Assur. Co., 82 Hun, 380, 31 N. Y. Supp. 237; *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335; *Donahue v. Windsor Ins. Co.*, 56 Vt. 374; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. Rep. 240. And see *Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. Rep. 762; *Kahler v. Insurance Co.*, 106 Iowa, 380; *Merrill v. Farmers' Ins. Co.*, 48 Me. 285; *Wheaton v. North B. & M. Ins. Co.*, 76 Cal. 415, 18 Pac. Rep. 758; *Weed v. London & Lancashire Ins. Co.*, 116 N. Y. 106, 22 N. E. Rep. 229; *Firemen's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. Rep. 513; *American Ins. Co. v. Barnett*, 73 Mo. 364; *Traders' Ins. Co. v. Cassell*, 24 Ind. App. 238, 56 N. E. Rep. 259; *German Ins. Co. v. Stiner*, Neb., 96 N. W. Rep. 122; *Continental Ins. Co. v. Cummings*, Tex., 81 S. W. Rep. 705; *Hartford Ins. Co. v. Enoch*, Ark., 77 S. W. Rep. 899; *Philadelphia Underwriters' Ins. Co. v. Bigelow*, Fla., 37 So. Rep. 210.

RULE 42.

Refusal to Pay on Specified Ground as Estoppel.

Refusal of the insurance company to pay loss on a specified ground may estop it from asserting any other ground of defense of which it had full knowledge;¹ but there must be in connection elements of estoppel;² nor is there a waiver where the refusal is on a specified ground among others.³

1. *McCormick v. Royal Ins. Co.*, 163 Pa. St. 184, 29 Atl. Rep. 747, 23 Ins. L. J. 778; *Douville v. Farmers' Ins. Co.*, 113 Mich. 158, 71 N. W. Rep. 517; *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192.

2. *Welsh v. London Assur. Co.*, 151 Pa. St. 607, 25 Atl. Rep. 142, 22 Ins. L. J. 94; *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163. And see *Findlay v. Union Ins. Co.*, 74 Vt. 211, 52 Atl. Rep. 429; *Brink v. Hanover Ins. Co.*, 80 N. Y. 108.

3. *Cronin v. Fire Assoc.*, 119 Mich. 74, 77 N. W. Rep. 643.

RULE 43.

Omission to Disclose Ground of Defense when Claim Made.

Omission to disclose ground of defense when claim is made does not operate as a waiver of it, unless as-

sured is misled by its intentional concealment to his injury or expense.

Devens v. Mechanics & Traders' Ins. Co., 83 N. Y. 168.

RULE 44.

Waiver not Prevented by Assertion of no Waiver.

Waiver by the insurance company after a loss in demanding compliance with terms of the policy, requiring insured to do some act or incur expense on account thereof, with knowledge of facts constituting ground of forfeiture, is not prevented by adding to the demand "this company neither admits nor denies its liability, nor waives any of its rights under said policy;"¹ or that "the company does not waive any of its rights and defenses, but expressly reserves each and every one."²

1. *Home Ins. Co. v. Kennedy*, 47 Nebr. 138, 66 N. W. Rep. 278; *Corson v. Anchor Ins. Co.*, 113 Iowa, 641, 85 N. W. Rep. 806.

2. *Georgia Home Ins. Co. v. Morriarty*, Tex. , 37 S. W. Rep. 628; *German-American Ins. Co. v. Everts*, 25 Tex. Civ. App. 300, 61 S. W. Rep. 536, writ of error denied, 62 S. W. Rep. 417; *Marthinson v. North B. & M. Ins. Co.*, 64 Mich. 372; *Granger v. Manchester Assurance Co.*, 119 Mich. 177. See Rule 51.

RULE 45.

Acceptance or Retention of Premium After Fire as Evidence of Waiver.

Acceptance or retention of the premium after the fire does not necessarily waive a forfeiture, where the premium was due and a part thereof earned,¹ but may estop the company from claiming that it had never incurred any liability;² and where it is accepted after a fire, with knowledge of the facts, it is evidence of

waiver of forfeiture;³ and so it may be, in connection with other facts, evidence of waiver when payment of premium is requested,⁴ but not when request is by mistake of a clerk, the company immediately tendering back the premium received.⁵

1. *Burner v. German-American Ins. Co.*, 20 Ky. L. Rep. 71, 45 S. W. Rep. 109, 27 Ins. L. J. 732; *Alabama State Ins. Co. v. Long Clothing Co.*, 123 Ala. 667, 26 So. Rep. 655, 28 Ins. L. J. 924; *Smith v. Continental Ins. Co.*, 6 Dak. 433, 43 N. W. Rep. 810; *Palmer v. Continental Ins. Co.*, 31 Mo. App. 467; *Robinson v. Aetna Ins. Co. (Ala.)*, 34 So. Rep. 18. And see *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354.

2. *Traders' Ins. Co. v. Pacaud*, 51 Ill. App. 252.

3. *Mechanics & Traders' Ins. Co. v. Smith*, 79 Miss. 142, 30 So. Rep. 362; *German Ins. Co. v. Shader*, Nebr., 93 N. W. Rep. 972; *Phoenix Ins. Co. v. Boyer*, 1 Ind. App. 329, 27 N. E. Rep. 628; *Millis v. Scottish Union & Nat. Ins. Co.*, 95 Mo. App. 211, 68 S. W. Rep. 1066. And see *Emery v. Svea Ins. Co.*, 88 Cal. 300, 26 Pac. Rep. 88; *Schroeder v. Springfield F. & M. Ins. Co.*, 51 S. C. 180, 28 S. E. Rep. 371.

4. *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628; *Lutz v. Anchor Ins. Co.*, 120 Iowa, 136, 94 N. W. Rep. 274.

5. *Ryan v. Rockford Ins. Co.*, 85 Wis. 573, 55 N. W. Rep. 1025. And see *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 So. Rep. 504; *Mississippi Fire Assoc. v. Dobbins*, 81 Miss. 630, 33 So. Rep. 506.

RULE 46.

Effect of Agreement in Settlement and Compromise.

An agreement of settlement and compromise not accepted by all parties, and never consummated, is not admissible to establish a waiver on the theory of recognition of the policy and its validity,¹ but may operate as a waiver of forfeiture when coupled with a new agreement to pay its amount.²

1. *Houdeck v. Merchants' & B. Ins. Co.*, 102 Iowa, 303, 71 N. W. Rep. 354.

2. *Concordia Ins. Co. v. Koretz*, 14 Colo. App. 386, 60 Pac. Rep. 191; *Tillis v. Liverpool, L. & G. Ins. Co.*, Fla., 35 So. Rep. 171.

RULE 47.**Effect of Offer in Compromise.**

A naked offer of compromise, made for the purpose of procuring a settlement of a pending controversy, and not containing any admission of a fact, is not admissible in evidence as a waiver of a forfeiture;¹ it may be admissible if the only dispute is as to the amount of the claim.²

1. *Strome v. London Assur. Co.*, 20 App. Div. 571, 47 N. Y. Supp. 481, *affd.*, 162 N. Y. 627, without opinion, citing *Smith v. Satterlee*, 130 N. Y. 677. And see *Pentz v. Pennsylvania Ins. Co.*, 92 Md. 444, 48 Atl. Rep. 139; *Richards v. Continental Ins. Co.*, 83 Mich. 508; *Liverpool, L. & G. Ins. Co. v. Sorsby*, 60 Miss. 302; *New Orleans Ins. Assoc. v. Matthews*, 65 Miss. 301; *Firemen's Fund Ins. Co. v. McGreevy*, 118 Fed. Rep. 415; *Morris v. Hartford Ins. Co.*, 57 S. C. 358, 35 S. E. Rep. 572; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

2. *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419; *Columbia Planing-Mill Co. v. American Ins. Co.*, 59 Mo. App. 204.

RULE 48.**Authority of Local Agents.**

Local agents, authorized to write and issue policies, and soliciting agents have no authority as such to waive a forfeiture after the occurrence of a loss; there must be some authority from the insurance company for such a purpose.

Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. Rep. 174, 26 Ins. L. J. 969; *Robinson v. Aetna Ins. Co.*, 128 Ala. 477, 30 So. Rep. 665; *Graham v. Niagara Ins. Co.*, 106 Ga. 840, 32 S. E. Rep. 579, 28 Ins. L. J. 442; *Elliot v. Farmers' Ins. Co.*, 114 Iowa, 153, 86 N. W. Rep. 224; *American Central Ins. Co. v. Bird's B. & L. Assoc.*, 81 Ill. App. 258; *Traders' Ins. Co. v. Cassall*, 24 Ind. App. 238, 56 N. E. Rep. 259; *Lippman v. Aetna Ins. Co.*, 120 Ga. 247, 47 S. E. Rep. 593. And see *Quinlan v. Providence Ins. Co.*, 133 N. Y. 356,

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31 N. E. Rep. 31; *Bush v. Westchester Ins. Co.*, 63 N. Y. 531; *Lohnes v. Insurance Co. of N. A.*, 121 Mass. 439; *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510. In New Jersey it has been held that a local agent authorized to fill up and issue policies has apparent authority to waive notice and proofs of loss. *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905. See also "Statement or Proof of Loss."

RULE 49.

Limitation on Authority of Agents in Policy no Application to Adjuster — Estoppel.

The limitation in the policy of the power of an agent to waive its conditions, has no application to an adjuster after the policy has become a demand against the insurance company; there is no limitation as to waiver of a forfeiture after the destruction of the property;¹ such limiting conditions requiring written evidence or indorsement have no reference as to what is done or to be done after a loss,² or are inoperative upon the theory of an estoppel when assured has acted in reliance upon acts or declarations of the company's adjuster.³

1. *Roberts, Willis & Co. v. Sun Mutual Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. Rep. 955, writ of error denied, 37 S. W. Rep. 311; *Loeb v. American Central Ins. Co.*, 99 Mo. 50, 12 S. W. Rep. 374; *Tillis v. Liverpool, L. & G. Ins. Co.*, Fla. , 35 So. Rep. 171; *Frost v. North British & M. Ins. Co.*, Vt. , 60 Atl. Rep. 803.

2. *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632, affd., 162 N. Y. 597, without opinion; *Strauss v. Palatine Ins. Co.*, 128 N. C. 64, 38 S. E. Rep. 256; *Farmers' Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. Rep. 184; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322; *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330, 64 N. E. Rep. 355; *Wheaton v. Insurance Co.*, 76 Cal. 415; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. Rep. 238, 28 Ins. L. J. 760; *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. Rep. 208; *Dick v. Equitable Ins. Co.*, 92 Wis. 46; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Franklin Ins. Co. v. Chi-*

cago Ice Co., 36 Md. 102; *Carson v. Jersey City Ins. Co.*, 14 Vroom (N. J.) 300; *New Orleans Ins. Assoc. v. Matthews*, 65 Miss. 301, 4 So. Rep. 62; *Gans v. St. Paul Ins. Co.*, 43 Wis. 108; *McFarland v. Kittanning Ins. Co.*, 134 Pa. St. 590, 19 Atl. Rep. 796; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, 19 Atl. Rep. 793; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270. And see *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11; *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193; *Smith v. Niagara Ins. Co.*, 60 Vt. 682; *Harrison v. German-American Ins. Co.*, 67 Fed. Rep. 577; *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 15 N. Y. Supp. 587; *Washburn-Halligan Coffee Co. v. Merchants' Ins. Co.*, 110 Iowa, 423, 81 N. W. Rep. 707; *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. Rep. 686, 27 Ins. L. J. 510; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905; *Metcalf v. Phoenix Ins. Co.*, 21 R. I. 307, 43 Atl. Rep. 541; *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228.

3. *Flaherty v. Continental Ins. Co.*, 20 App. Div. 275, 46 N. Y. Supp. 934; *Sargent v. Liverpool, L. & G. Ins. Co.*, 155 N. Y. 349, 49 N. E. Rep. 935, revg. 85 Hun, 31. In Michigan it would seem that the waiver clause or condition in the policy requiring written evidence may apply to an adjuster, though this is not clear from the case as reported; the opinion may have, so far as the precise point is involved, been intended to apply to the local agent rather than to the adjuster. The inference is strengthened by the case cited as authority which was decided as applicable to the local agent. See *Wadhams v. Western Assur. Co.*, 117 Mich. 514, citing *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302.

In *Mo. Pac. Ry. Co. v. Western Assur. Co.*, 129 Fed. Rep. 610 (U. S. Cir.), it was held that waiver of proofs must be in writing, but this case seems to be substantially overruled by *Phoenix Ins. Co. v. Kerr*, 129 Fed. Rep. 723, C. C. A. .

RULE 50.

Authority of Adjuster.

An adjuster, with authority to examine, investigate, and adjust a loss, has authority to waive conditions of the policy or forfeiture, on ground thereof, and does so by treating policy within apparent scope of his authority as valid and subsisting after knowledge of the facts;¹ but such waiver cannot be predicated upon a mere visit of adjuster to scene of fire and when he does not see or have any communication with insured;² but negotiations for settlement, offer to compromise, or

pay, in connection with other facts, may be evidence of waiver,³ specially where the insured is induced thereby to act; for instance, to compromise with another company.⁴

1. *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. Rep. 399, 128 Ala. 451, 30 So. Rep. 537; *Corson v. Anchor Ins. Co.*, 113 Iowa, 641, 85 N. W. Rep. 806.

2. *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394, 27 Ins. L. J. 928.

3. *British-American Assur. Co. v. Bradford*, 60 Kans. 82, 55 Pac. Rep. 335, 28 Ins. L. J. 262; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401; *Walker v. Phoenix Assur. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392; *Dobson v. Hartford Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456.

4. *Gibbs v. Dutchess County Mut. Ins. Co.*, 21 N. Y. Supp. 203, 66 Hun, 632, memo. not reported. And see "Adjuster and Adjustment."

RULE 51.

Adjuster Cannot Treat Policy as Both Void and Valid — Judged by What He Does.

An adjuster cannot treat a policy as both void and valid and will be judged and treated by what he does whenever inconsistent with what he says on a question of waiver.

German-American Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. Rep. 536, writ of error denied, 62 S. W. Rep. 417.

RULE 52.

A Nonwaiver Agreement Does not Necessarily Prevent Waiver.

A nonwaiver agreement, taken from the assured by an adjuster, after latter has knowledge of a fact forfeiting the insurance, does not prevent waiver of that particular ground of forfeiture by the adjuster. An adjuster cannot, by his own stipulation, deprive himself of the power to waive a forfeiture, nor can he

deprive himself of the power to waive his own stipulation for nonwaiver.

Corson v. Anchor Ins. Co., 113 Iowa, 641, 85 N. W. Rep. 806.

RULE 53.

Nonwaiver Agreement not Extended by Construction.

A nonwaiver agreement by assured and company's adjuster after a loss must be strictly construed in favor of the assured and cannot be extended by construction; nor does such an agreement prevent adjuster or the company from making an effective waiver outside of the terms of the specific agreement or after the investigation of the facts.

Pennsylvania Ins. Co. v. Hughes, 108 Fed. Rep. 497, 47 C. A. 459. And see *McLean v. American Ins. Co.*, Iowa, 98 N. W. Rep. 146.

RULE 54.

Stipulation by Insured Does not Necessarily Prevent Waiver by Adjuster.

A stipulation by assured, after an adjuster has acquired knowledge of a fact upon which forfeiture of the insurance might be claimed, to the effect that "nothing said adjuster may do, or say, or write shall in any way be construed as waiving any of the rights or defenses of said company, or any condition or requirements of said policy as to proofs of loss, or otherwise," does not prevent an effective waiver by the adjuster.

Corson v. Anchor Ins. Co., 113 Iowa, 641, 85 N. W. Rep. 806.

RULE 55.

Nonwaiver Agreement Must be Received and Considered by the Court.

Where, after the fire, the assured makes an agreement with the adjuster that "any action taken, request made, or information received, should not in any respect change or determine rights of the parties under the policy or waive any of its conditions," such agreement must be received and considered by the court upon any subsequent claim or issue of waiver.

Sun Mutual Ins. Co. v. Dudley, 65 Ark. 240. And see *Dolan v. Missouri Ins. Co.*, 88 Mo. App. 666, 677; *Fletcher v. Minneapolis Ins. Co.*, 80 Minn. 152, 83 N. W. Rep. 29; *Curlee v. Texas Home Ins. Co.*, Tex. Civ. App., 73 S. W. Rep. 831; *Keet-Rountree Dry Goods Co. v. Mercantile Ins. Co.* (Mo. App.), 74 S. W. Rep. 469; *Hayes v. United States Ins. Co.* (N. C.), 44 S. E. Rep. 404.

RULE 56.

Facts Occurring Before Execution of Nonwaiver Agreement.

If the facts claimed to operate as evidence of a waiver occur before the execution of a nonwaiver agreement taken by the adjuster, guarding against the consequences of his own acts, the assured is not deprived of his right to have the question of such waiver submitted to a jury.

Robinson v. Aetna Ins. Co., 128 Ala. 477, 30 So. Rep. 665.

RULE 57.

Effect of Assertion by Adjuster that Policy is Void, Coupled with Suggestion for Proofs.

An assertion by an adjuster that policy was void, but in connection suggesting or advising that assured

might make out proofs of loss, as company might not insist upon the forfeiture, is not sufficient evidence of a waiver of a forfeiture;¹ nor when assured is advised of ground of objection and defense does a mere request for proofs operate as a waiver;² nor where proofs are demanded in response to an inquiry from the insured.³

1. *Mathie v. Globe Ins. Co.*, 68 App. Div. 239, 74 N. Y. Supp. 177, *affd.*, 174 N. Y. 489, 67 N. E. Rep. 57. And see *Labell v. Georgia Home Ins. Co.* (Tex.), 28 S. W. Rep. 133; *Gray v. Guardian Assur. Co.*, 82 Hun, 380, 31 N. Y. Supp. 237. Compare *Mississippi Home Ins. Co. v. Dobbins*, Miss., 33 So. Rep. 504.

2. *Donough v. Farmers' Ins. Co.*, 104 Mich. 503, 62 N. W. Rep. 721, 25 Ins. L. J. 472; *Betcher v. Capital Ins. Co.*, 78 Minn. 240, 80 N. W. Rep. 971; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150.

3. *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464, 27 Ins. L. J. 584.

RULE 58.

Waiver as Question of Fact or Law.

While waiver is usually a question of fact to be determined by a jury,¹ if there is no conflict in the evidence it may be determined by the court as matter of law.²

1. *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392, *revg.* 89 Hun, 333, 35 N. Y. Supp. 374; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. Rep. 324, 27 Ins. L. J. 19; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. Rep. 606, 25 Ins. L. J. 267, *affg.* 55 Ill. App. 622; *Walter v. Mutual City Ins. Co.*, 120 Mich. 35, 78 N. W. Rep. 1011.

2. *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. Rep. 606, 25 Ins. L. J. 267, *affg.* 55 Ill. App. 622.

RULE 59.

Waiver of Premium.

Prepayment of the premium is waived by delivery of the policy without such payment, by giving credit for

same or by any conduct inconsistent with intent to insist thereon.

Commonwealth Ins. Co. v. Knabe Mfg. Co., 171 Mass. 265, 50 N. E. Rep. 516; *Gayssville Mfg. Co. v. Phoenix Ins. Co.*, 67 N. H. 457, 36 Atl. Rep. 367; *Firemen's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. Rep. 779; *Gosch v. State Ins. Co.*, 44 Ill. App. 263; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Planters' Ins. Co. v. Ray*, 52 Miss. 325; *Baptist Church v. Brooklyn Ins. Co.*, 28 N. Y. 153; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Boehan v. Williamsburg City Ins. Co.*, 35 N. Y. 131; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Mason v. Citizens' Ins. Co.*, 10 W. Va. 572; *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Elkins v. Susquehanna Ins. Co.*, 113 Pa. St. 387; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246.

RULE 6o.

Waiver of Conditions Precedent Should be Plead.

An allegation of performance of a condition precedent to a loss becoming due and payable or right to maintain a suit is not sustained by evidence of waiver of such condition; if the insured has not performed and depends upon waiver by the insurance company the facts constituting such waiver should be alleged or pleaded;¹ but an offer by insured to perform, declined by the company, may be proof of performance.² When a statute or code permits a general allegation of performance under the words "duly performed," the word "duly" is one of substance and not merely of form, and must be used in pleading.³

1. *St. Paul F. & M. Ins. Co. v. Hodge*, 30 Tex. Civ. App. 257, 71 S. W. Rep. 386; *Todd v. Union Casualty Co.*, 70 App.

Div. 52, 55, 74 N. Y. Supp. 1062. And see *La Chicotte v. Richmond R. Co.*, 15 App. Div. 380, 44 N. Y. Supp. 75; *Fox v. Davidson*, 36 App. Div. 159, 55 N. Y. Supp. 524; *Smith v. Wetmore*, 167 N. Y. 234, 237; *Texas Banking Co. v. Hutchins*, 53 Tex. 61; *Eiseman v. Hawkeye Ins. Co.*, 74 Iowa, 11; *Dwelling-House Ins. Co. v. Johnson*, 47 Kans. 1. There is an expression to contrary in *McManus v. Western Assur. Co.*, 43 App. Div. 550, *affd.*, 167 N. Y. 602, without opinion. *Allen v. Dutchess Co. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530, sustains the rule, but upon the specific question there decided it is doubtful whether it properly distinguishes between the two classes of conditions. See Rule 61.

Insured may plead both performance and waiver and rely upon that which his evidence establishes. *Warshavsky v. Anchor Ins. Co.*, 98 Iowa, 221, 67 N. W. Rep. 237. That proof of waiver may be admitted under an allegation of performance, see *Nickell v. Phoenix Ins. Co.*, 144 Mo. 420, 46 S. W. Rep. 435, 27 Ins. L. J. 880; *Murphy v. North B. & M. Ins. Co.*, 70 Mo. App. 78; *McCullum v. Niagara Ins. Co.*, 61 Mo. App. 352; *Stephens v. Union Ins. Soc.*, 16 Utah, 27, 50 Pac. Rep. 626, 27 Ins. L. J. 165.

2. *Hooker v. Phoenix Ins. Co.*, 69 Mo. App. 141.

3. *Clemens v. American Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484; *Guarino v. Fireman's Ins. Co.*, 44 Misc. 218, 88 N. Y. Supp. 1044.

RULE 61.

Pleading and Evidence of Waiver or Estoppel as to an Affirmative Defense.

When the insurance company sets up an affirmative defense and the insured depends upon waiver or estoppel, and a code of procedure or modern practice act creates an issue on the defendant's answer, the

insured may give evidence of such waiver or estoppel in rebuttal or reply to the defendant's evidence without pleading it;¹ evidence claimed to operate as an estoppel is no part of plaintiff's proof or case originally, and if offered as such it is proper to exclude it;² nor is it proper for the defendant, upon cross-examination of plaintiff's witnesses, to question them with intent to establish its defense;³ even if such evidence is admitted defendant is not entitled to a nonsuit thereon, because the plaintiff would be deprived of right to show waiver or estoppel on part of the defendant.⁴

1. *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462; *McGuire v. Hartford Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300, *affd.* without opinion, 158 N. Y. 680; *Andes Ins. Co. v. Fish*, 71 Ill. 620. And see *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Gans v. St. Paul Ins. Co.*, 43 Wis. 108; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560; *West Rockingham Ins. Co. v. Sheets*, 26 Gratt. (Va.) 854; *Lycoming Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Wilson v. Hawkeye Ins. Co.*, 70 Iowa, 91; *Crittenden v. Springfield Ins. Co.*, 85 Iowa, 652, 52 N. W. Rep. 548; *Couch v. City Ins. Co.*, 37 Conn. 248; *West v. Norwich Union Ins. Co.*, 10 Utah, 442, 37 Pac. Rep. 685. Where the issue is not created by answer, the waiver must be pleaded in reply. *Kahler v. Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. Rep. 734; *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. Rep. 529, 28 Ins. L. J. 162; *Burlington Ins. Co. v. Campbell*, 42 Nebr. 208, 60 N. W. Rep. 599; *Ætna Ins. Co. v. Holcomb*, 89 La. 404, 34 S. W. Rep. 915, 25 Ins. L. J. 833; *Bruce v. Phoenix Ins. Co.*, 24 Oreg. 486, 34 Pac. Rep. 16. This and preceding rule are governed by local rules of practice to which reference must be had.

2. *Barnett v. Farmers' Ins. Co.*, 115 Mich. 247, 73 N. W. Rep. 372.
3. *McGuire v. Hartford Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 30, affd. without opinion, 158 N. Y. 680.
4. *Copeland v. Western Assur. Co.*, 43 S. C. 26, 20 S. E. Rep. 754.

CHAPTER ELEVENTH.

Construction and Interpretation of the Fire Insurance Contract.

- RULE 1. State legislature cannot constitutionally delegate its power to prescribe a standard form of insurance policy — Construction of a standard form.
2. Standard form construed as a contract — May affect a question of waiver but not estoppel.
 3. Presumption as to use of words and phrases in standard form — Doubtful questions.
 4. Effect of standard form of one State being prescribed by another.
 5. Insured bound by terms of accepted policy — Cannot plead ignorance — Estoppel.
 6. Construction of policy when terms clear and unambiguous — Parol evidence.
 7. Policy should be construed same as any other instrument.
 8. Technical meaning of words in trade or business.
 9. All parts must be considered and harmonized, if possible — No provision disregarded simply because inconsistent.
 10. Plain language not affected by interpretation of tariff association.
 11. Distinction in construction of two classes of conditions in policy.
 12. Limitation on preceding rule — Insured not relieved of obligation of performance.
 13. Construction cannot make new or different contract — Parol evidence.
 14. Meaning of word "void."
 15. Insured responsible for his own acts only, unless plain and explicit language otherwise.
 16. When positive agreement certain thing shall not be done, insured responsible for act of one to whom commits control of premises.
 17. When language ambiguous, construction favors insured — This rule not affected by standard form.

- RULE 18.** If policy requires construction courts will sustain the contract in preference to making it forfeit.
19. Courts will follow construction of the parties.
 20. Conflict between written or descriptive part and printed conditions.
 21. Admission of parol evidence to explain ambiguity.
 22. When language plain, and clear evidence of usage or custom not admissible.
 23. When evidence of usage or custom admissible — When binding.
 24. When usage or custom presumed to enter into intention.
 25. Evidence of usage or custom.
 26. Effect of the word "entire" on divisibility of contract.
 27. Divisibility of contract not affected by entirety of premium.
 28. Distinction between matters of interpretation and remedy as to what law governs.
 29. Same subject — Rights and remedies — General rule.
 30. Contract made when mailed.
 31. Making of contract may be conditional — Intention.
 32. When policy required to be countersigned.
 33. Action on policy in another State than where issued, and property situate.
 34. When policy void by express terms of a statute.
 35. No defense to action on policy that company has not complied with statutory requirements of State where suit brought.
 36. Rights of parties fixed on forfeiture — Not affected by subsequent statute.

RULE 1.

State Legislature Cannot Constitutionally Delegate its Power to Prescribe a Standard Form of Insurance Policy — Construction of a Standard Form.

A State legislature cannot constitutionally or lawfully delegate its power to prescribe a standard form of fire insurance contract to an insurance commissioner or other party, and a policy thus prescribed or used derives no additional force as a contract in construction on account of such a statute;¹ but when the

form of an insurance policy is properly adopted and prescribed by statute it is not only construed by the courts as a contract, but in legal effect as a statutory law when in conflict with another statute.²

1. *O'Neill v. American Ins. Co.*, 166 Pa. St. 72, 30 Atl. Rep. 943; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. Rep. 738, 31 L. R. A. 112; *Goss v. Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. Rep. 1036; *Flatley v. Phoenix Ins. Co.*, 95 Wis. 618, 70 N. W. Rep. 828; *Anderson v. Manchester Assur. Co.*, 59 Minn. 182, 64 N. W. Rep. 241; *Phoenix Ins. Co. v. Perkins, S. D.*, 101 N. W. Rep. 1110; *King v. Concordia Ins. Co.*, Mich., 103 N. W. Rep. 616.

2. *Temple v. Niagara Ins. Co.*, 109 Wis. 372, 85 N. W. Rep. 361. And see *Anderson v. Manchester Assur. Co.*, 59 Minn. 182, 64 N. W. Rep. 241; *Vorous v. Phoenix Ins. Co.*, 102 Wis. 76.

RULE 2.

Standard Form Construed as a Contract — May Affect a Question of Waiver but not Estoppel.

A form of policy of fire insurance, prescribed by statute, is none the less when issued by the company a contract, subject to construction by the courts as such;¹ it may affect a question of pure waiver, but does not prevent a company from being estopped by its declarations or conduct.²

1. *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 421; *Chichester v. New Hampshire Ins. Co.*, 74 Conn. 510, 51 Atl. Rep. 545; *Kollitz v. Equitable Ins. Co.*, Minn., 99 N. W. Rep. 892.

2. *Matthews v. Capital City Ins. Co.*, 115 Wis. 272, 91 N. W. Rep. 675; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295; *Welch v. Fire Assoc.*, Wis., 98 N. W. Rep. 227; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31. That a standard form does not restrict or abridge right of waiver, see *Bigelow v. Granite State Ins. Co.*, 94 Me. 39, 46 Atl. Rep. 808.

RULE 3.

Presumption as to Use of Words and Phrases in Standard Form — Doubtful Questions.

It must be assumed that words and phrases in the standard form of policy were used with reference to previous decisions of the courts in respect to their

meaning and effect, and doubtful questions are solved by an application of the principles which the courts have applied in analogous cases.

Walradt v. Phoenix Ins. Co., 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81; *John Davis Co. v. Insurance Co. of N. A.*, 115 Mich. 382, 73 N. W. Rep. 393, 27 Ins. L. J. 184. And see also *Matthews v. American Central Ins. Co.*, 154 N. Y. 456, 48 N. E. Rep. 751; *Stage v. Home Ins. Co.*, 76 App. Div. 509, 512, 78 N. Y. Supp. 555.

RULE 4.

Effect of Standard Form of One State Being Prescribed by Another.

The New York standard form of fire insurance contract, although prescribed by the legislature of another State, is subject to the provision of the statute of such State, that all contracts of insurance, the application for which was taken within that State, shall be deemed to have been made within it and subject to the laws thereof. The New York form is none the less a contract of such State, solvable under its laws and determinable by its decisions.¹ So, when a policy is issued by a foreign company, upon an application of a broker in North Carolina, upon property there of a citizen of that State, in an action in the courts of that State, under the statute, the contract will be deemed to have been made there and subject to its laws.²

1. *Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. Rep. 944.

2. *Commonwealth Mutual Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. Rep. 404. And see *Mutual Ins. Co. v. Robison*, 54 Fed. Rep. 580.

RULE 5.

Insured Bound by Terms of Accepted Policy — Cannot Plead Ignorance — Estoppel.

The insured is bound by the terms and conditions of an accepted policy,¹ and cannot escape legal conse-

quences by claiming that he did not read it or that he was ignorant of its contents or unable to read,² although evidence that he did not read it may be admissible as tending to show reliance on agent's acts or declarations when policy issued,³ when misled by the company or its agent.⁴

1. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. Rep. 425, 24 Ins. L. J. 47; *Northern Assur. Co. v. Grand View Building Assoc.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133; *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627, affg. 55 Ill. App. 275; *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. Rep. 833; *Moore v. State Ins. Co.*, 72 Iowa, 414, 34 N. W. Rep. 183; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. Rep. 309; *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519, 49 N. W. Rep. 253; *Overton v. American Central Ins. Co.*, 79 Mo. App. 1; *Shields v. Society*, 121 Mich. 690.

2. *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. Rep. 833; *Cornelius v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. Rep. 1037; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. Rep. 188, 22 Ins. L. J. 599; *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 77 N. W. Rep. 752; *Mitchell v. Potomac Ins. Co.*, 16 App. D. C. 241; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. Rep. 915, 25 Ins. L. J. 833; *Hartford Ins. Co. v. Davis*, 59 Mo. App. 405; *Pearson v. German Ins. Co.*, 73 Mo. App. 480; *Ramer v. American Central Ins. Co.*, 70 Mo. App. 47; *School District v. State Ins. Co.*, 61 Mo. App. 597; *Keller v. Liverpool, L. & G. Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. Rep. 695; *Guinn v. Phoenix Ins. Co. (Tex.)*, 31 S. W. Rep. 566; *Hartford Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. Rep. 140; *Skinner v. Norman*, 18 App. Div. 609, 46 N. Y. Supp. 65; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31; *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; *Ervin v. New York Central Ins. Co.*, 3 T. & C. 213; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Cuthbertson v. North Carolina Ins. Co.*, 96 N. C. 480; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 65 Mich. 527; *Morrison v. Insurance Co. of N. A.*, 69 Tex. 353, 6 S. W. Rep. 605; *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799; *Bonneville v. Western Ins. Co.*, 68 Wis. 298; *Fuller v. Madison Ins. Co.*, 36 Wis.

599; *Monitor Ins. Co. v. Buffum*, 115 Mass. 343; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Liverpool, L. & G. Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 579, 69 Pac. Rep. 936, 938.

3. *Miaghan v. Hartford Ins. Co.*, 24 Hun, 58. And see "Waiver," Rule 16.

4. *Burson v. Fire Assoc.*, 136 Pa. St. 267; *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82.

RULE 6.

Construction of Policy when Terms Clear and Unambiguous — Parol Evidence.

Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary, and popular sense;¹ in such a case parol evidence is not admissible in explanation of intent.²

1. *Imperial Ins. Co. v. Coos County*, 151 U. S. 452, 23 Ins. L. J. 282; *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663; *East Texas Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. Rep. 122; *Kiesel v. Sun Ins. Co.*, 88 Fed. Rep. 243, 60 U. S. App. 101, 31 C. C. A. 518; *Bole v. New Hampshire Ins. Co.*, 159 Pa. St. 53, 28 Atl. Rep. 205, 23 Ins. L. J. 857; *Savage v. Howard Ins. Co.*, 52 N. Y. 504; *Foot v. Aetna Ins. Co.*, 61 N. Y. 571; *Herman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Weidert v. State Ins. Co.*, 19 Oreg. 261, 24 Pac. Rep. 242; *Nelson v. Traders' Ins. Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220, affd., 181 N. Y. 472, 74 N. E. Rep. 421.

2. *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S. W. Rep. 711; *Thurston v. Burnett & Beaver Dam Ins. Co.*, 98 Wis. 476, 74 N. W. Rep. 131, 27 Ins. L. J. 602; *Baltimore Ins. Co. v. Loney*, 20 Md. 20; *Hough v. People's Ins. Co.*, 36 Md. 398; *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; *Robinson v. Insurance Co.*, 51 Ark. 441. And see *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400; *McClusky v. Providence Ins. Co.*, 126 Mass. 306; *Liverpool, L. & G. Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 579, 69 Pac. Rep. 936. See Rules 13, 21.

RULE 7.

Policy Should be Construed Same as Any Other Instrument.

The rules of construction are the same in construing a policy of insurance as in the case of any other instrument. It is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention, be understood in some other special or peculiar sense.

Hart *v.* Standard Ins. Co., L. R., 22 Q. B. Div. 499, quoting Lord Ellenborough in Robertson *v.* French, 4 East, 130; Allen *v.* German-American Ins. Co., 123 N. Y. 12; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136; Connecticut Ins. Co. *v.* Tilley, 88 Va. 1024, 14 S. E. Rep. 851; Hoover *v.* Mercantile Ins. Co., 93 Mo. App. 111, 69 S. W. Rep. 42; Marsh *v.* Concord Ins. Co., 71 N. H. 253, 51 Atl. Rep. 898; Delaware Ins. Co. *v.* Greer (C. C. A.), 120 Fed. Rep. 916.

RULE 8.

Technical Meaning of Words in Trade or Business.

When particular words have acquired an exact and technical meaning in any trade or business, and are used in a contract relating to such business, *prima facie* they are to be construed in the meaning or sense which they have acquired in that business.

Houghton *v.* Watertown Ins. Co., 131 Mass. 300. And see Union Ins. Co. *v.* American Ins. Co., 107 Cal. 327, 40 Pac.

Rep. 431, 28 L. R. A. 692; *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. Rep. 191; *Holter Lumber Co. v. Firemen's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. Rep. 207, 26 Ins. L. J. 10.

RULE 9.

All Parts Must be Considered and Harmonized if Possible — No Provision Disregarded Simply Because Inconsistent.

The meaning of an insurance contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded simply because inconsistent with other provisions, unless no other reasonable construction is possible; if the two can stand together and reasonable effect be given to both, then both are to be retained;¹ where effect being given to both it will tend to carry out the clear purpose or intent of the agreement.²

1. *German Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. Rep. 1097, 26 Ins. L. J. 699, 36 L. R. A. 236; *Gunther v. Liverpool, L. & G. Ins. Co.*, 134 U. S. 110; *Pabst Brewing Co. v. Union Ins. Co.*, 63 Mo. App. 663; *A. A. Griffing Iron Co. v. Liverpool, L. & G. Ins. Co.*, N. J. L. , 54 Atl. Rep. 409; *Jackson v. British-American Ins. Co.*, 106 Mich. 47, 63 N. W. Rep. 899; *Merchants' Ins. Co. v. Edmond*, 17 Gratt. (Va.) 138; *Cobb v. Insurance Co. of N. A.*, 17 Kans. 492. And see *Mack v. Rochester German Ins. Co.*, 106 N. Y. 560, 13 N. E. Rep. 343; *Springfield Ins. Co. v. McLimans*, 28 Nebr. 846, 45 N. W. Rep. 171; *Vanderoolgen v. Manchester Assur. Co.*, 123 Mich. 291, 82 N. W. Rep. 46.

2. *Eddy v. London Assur. Co.*, 143 N. Y. 311, 38 N. E. Rep. 307, 24 Ins. L. J. 1; *Crane v. City Ins. Co.*, 3 Fed. Rep. 558; *Barber v. Insurance Co.*, 16 W. Va. 658; *Strauss v. Imperial Ins. Co.*, 94 Mo. 182, 6 S. W. Rep. 698; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun, 328; *Blinn v. Dresden Ins. Co.*, 85 Me. 389. See Rule 20.

RULE 10.

Plain Language not Affected by Interpretation of Tariff Association.

Plain language is not affected by the interpretation of a local tariff association of insurance companies or their representatives.

Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213.

RULE 11.

Distinction in Construction of Two Classes of Conditions in Policy.

There are two classes of conditions in the fire insurance policy, and there is a distinction between them; those which operate upon the parties prior to a loss, upon which liability is made to depend, and those which relate to matters after a loss or which become operative in event of a loss. As to the latter class of conditions they should receive a more liberal construction in favor of the insured.

McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. Rep. 475; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 37 N. E. Rep. 639; *Sergeant v. Liverpool, L. & G. Ins. Co.*, 155 N. Y. 349, 49 N. E. Rep. 935; *Sharpe v. Milwaukee Mechanics' Ins. Co.*, 8 App. Div. 358, 40 N. Y. Supp. 817, *affd.* on opinion below, 158 N. Y. 696; *Hinman v. Hartford Ins. Co.*, 36 Wis. 159. And see *Seyk v. Millers' Ins. Co.*, 74 Wis. 67, 41 N. W. Rep. 443; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. Rep. 1005.

RULE 12.

Limitation on Preceding Rule—Insured not Relieved of Obligation of Performance.

But this last rule of construction does not operate to relieve the insured from making effort to comply

with conditions precedent to loss becoming due and payable. If there are obstacles to their performance assured must make a reasonable effort to remove them; if, after due diligence, they prove insurmountable for a time, delay will be excusable, and performance at the earliest practicable moment thereafter will be sufficient; but to excuse nonperformance it must appear that the act to be done could not by any reasonable means have been accomplished. Mere difficulty of performance is not enough.

Matthews v. American Central Ins. Co., 154 N. Y. 449, 48 N. E. Rep. 751, 27 Ins. L. J. 193, 39 L. R. A. 433.

RULE 13.

Construction Cannot Make New or Different Contract—Parol Evidence.

Construction cannot make a new or different contract for the parties;¹ nor is parol evidence admissible to change the terms of the contract when distinct and clear.²

1. *Schuerman v. Dwelling-House Ins. Co.*, 161 Ill. 437, 43 N. E. Rep. 1093; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7. And see *Bruton v. Metropolitan Ins. Co.*, 48 Hun, 204; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461; *Holmes v. Charlestown Ins. Co.*, 10 Met. (Mass.) 211.

2. *Michigan Shingle Co. v. London & Lancashire Ins. Co.*, 91 Mich. 441, 51 N. W. Rep. 1111; *Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350. See Rules 6, 21.

RULE 14.

Meaning of Word "Void."

The word "void" is employed in the policy in the sense of "voidable;" any condition may be waived;¹ if policy contains a clause not authorized by a prescribed standard form, it is not void, but may be voidable at option of the insured.²

1. Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. Rep. 399, 28 Ins. L. J. 199; Ohio Farmers' Ins. Co. v. Burgett, 65 Ohio St. 119, 61 N. E. Rep. 712, 55 L. R. A. 825; Vining v. Franklin Ins. Co., 89 Mo. App. 311; Insurance Co. v. Norton, 6 Otto (U. S.), 234; Pratt v. New York Central Ins. Co., 55 N. Y. 505; Turner v. Meriden Ins. Co., 16 Fed. Rep. 454; Hunt v. State Ins. Co., 66 Nebr. 121, 92 N. W. Rep. 921, revg. previous decision on rehearing; German Ins. Co. v. Shader, Neb., 93 N. W. Rep. 972; Swedish-American Ins. Co. v. Knutson, Kans., 72 Pac. Rep. 526; Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. Rep. 762.

2. Armstrong v. Western Mfrs. Ins. Co., 95 Mich. 137, 54 N. W. Rep. 637.

RULE 15.

Insured Responsible for His Own Acts Only, Unless Plain and Explicit Language Otherwise.

Clauses or conditions in the policy creating a forfeiture or declaring it void are ordinarily construed to relate only to voluntary acts of the assured which fall plainly within their terms. The courts will not construe them as embracing acts of third parties or proceedings *in invitum*, unless the language of the condition is so plain and explicit that no other construction can be adopted.

Small v. Westchester Ins. Co., 51 Fed. Rep. 789, 22 Ins. L. J. 660; Green v. Homestead Ins. Co., 17 Hun, 467, affd., 82 N. Y. 517.

RULE 16.

When Positive Agreement Certain Thing Shall not be Done Insured Responsible for Acts of One to Whom Commits Control of Premises.

When assured agrees that a prohibited thing should not be done and commits the control of the insured

premises to another, the latter becomes his representative, for whom he must answer as for himself.

Liverpool, L. & G. Ins. Co. *v.* Gunther, 116 U. S. 113. And see *Concordia Ins. Co. v. Johnson*, 4 Kans. App. 7, 45 Pac. Rep. 722; *Badger v. Platto*, 68 N. H. 222, 44 Atl. Rep. 296.

RULE 17.

When Language Ambiguous, Construction Favors Insured — This Rule not Affected by Standard Form.

It is a settled rule that when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured;¹ and this rule is not affected by the fact that the insurance contract is of the standard form;² the interpretation is in the sense in which the insured might have reasonably understood the words used;³ and this rule of construction applies to reinsurance contracts.⁴

1. *Imperial Ins. Co. v. Coos Co.*, 151 U. S. 452; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. Rep. 1019; *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247; *Royal Ins. Co. v. Vanderbilt Ins. Co.*, 102 Tenn. 264, 52 S. W. Rep. 168, 28 Ins. L. J. 910; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. Rep. 810, affg. 64 App. Div. 182; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 62 N. E. Rep. 167; *Maisel v. Fire Assoc.*, 59 App. Div. 461, 69 N. Y. Supp. 181; *Hampton v. Hartford Ins. Co.*, 65 N. J. L. 265, 47 Atl. Rep. 433, 52 L. R. A. 344; *Mitchell v. Potomac Ins. Co.*, 16 App. D. C. 241; *McKeesport Machine Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. Rep. 16; *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Atl. Rep. 77; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. Rep. 139, affg. 77 Ill. App. 413; *Niagara Ins. Co. v. Heenan*, 181 Ill. 575, 54 N. E. Rep. 1052; *Queen Ins. Co. v. Dearborn*

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Loan Assoc., 175 Ill. 115, 51 N. E. Rep. 717; Niagara Ins. Co. v. Scammon, 100 Ill. 644; Fire Assoc. v. Short, 100 Ill. App. 553; Brown v. Palatine Ins. Co., 89 Tex. 590, 35 S. W. Rep. 1060, 25 Ins. L. J. 812; New Orleans Ins. Co. v. Gordon, 68 Tex. 144, 3 S. W. Rep. 718; Home Ins. Co. v. Tomkies, 30 Tex. Civ. App. 404, 71 S. W. Rep. 812; German Ins. Co. v. Hayden, 21 Colo. 127, 40 Pac. Rep. 453; Carson v. Insurance Co., 43 N. J. L. 300; Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 42 N. E. Rep. 546, 25 Ins. L. J. 488; Bonenfant v. American Ins. Co., 76 Mich. 653, 43 N. W. Rep. 682; Boyd v. Mississippi Home Ins. Co., 75 Miss. 47, 21 So. Rep. 708, 26 Ins. L. J. 708; Stone v. Insurance Co., 69 N. H. 438; Virginia F. & M. Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. Rep. 454; Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S. E. Rep. 850; Cleavenger v. Franklin Ins. Co., 47 W. Va. 595, 35 S. E. Rep. 998; Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. Rep. 399, 28 Ins. L. J. 199; Holter Lumber Co. v. Firemen's Fund Ins. Co., 18 Mont. 282, 45 Pac. Rep. 207; Strauss v. Phoenix Ins. Co., 9 Colo. App. 386, 48 Pac. Rep. 822, 26 Ins. L. J. 676; German Ins. Co. v. Seibert, 24 Ind. App. 279, 56 N. E. Rep. 686; Getman v. Guardian Ins. Co., 46 Ill. App. 489; Zeigler v. Clinton Co., 84 Ill. App. 442; Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231; Association v. Smith, 85 Fed. Rep. 401, 29 C. C. A. 223; Ethington v. Dwelling-House Ins. Co., 55 Mo. App. 129; Burnett v. American Central Ins. Co., 68 Mo. App. 343; Rogers v. Phoenix Ins. Co., 121 Ind. 570, 23 N. E. Rep. 498; German Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. Rep. 534; Aetna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. Rep. 934; Hanover Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. Rep. 772; Kratzenstein v. Western Assur. Co., 116 N. Y. 54, 22 N. E. Rep. 221; Mead v. American Ins. Co., 13 App. Div. 476, 43 N. Y. Supp. 334; De Graff v. Queen Ins. Co., 38 Minn. 501, 38 N. W. Rep. 696; Pettit v. State Ins. Co., 41 Minn. 299, 43 N. W. Rep. 378; Fisher v. Crescent Ins. Co., 33 Fed. Rep. 549; Wallace v. German-American Ins. Co., 41 Fed. Rep. 742; Meyer v. Queen Ins. Co., 41 La. Ann. 1000, 6 So. Rep. 899; Insurance Co. v. Wallace, 93 Ind. 7; Insurance Co. v. Hazlett, 105 Ind. 212; Continental Ins. Co. v. Daniel, 78 S. W. Rep. 866 (Ky.); L'Engle v. Scottish Union & Nat. Ins. Co., Fla. , 37 So. Rep. 462; German-American Ins. Co. v. Yeagley, Ind. , 71 N. E. Rep. 897; London & Lancashire Ins. Co. v. Davis, Tex. Civ. App. , 84 S. W. Rep. 260;

Howerton *v.* Iowa State Ins. Co., Mo. App. , 80 S. W. Rep. 27.

2. Matthews *v.* American Central Ins. Co., 154 N. Y. 456, 48 N. E. Rep. 751; Walradt *v.* Phoenix Ins. Co., 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81. And see Read *v.* Washington Ins. Co., 138 Mass. 572; Maisel *v.* Fire Assoc., 59 App. Div. 461, 69 N. Y. Supp. 181; Buffalo Elevating Co. *v.* Prussian National Ins. Co., 64 App. Div. 182, 71 N. Y. Supp. 918, *affd.*, 171 N. Y. 25.

3. Mead *v.* American Ins. Co., 13 App. Div. 476, 43 N. Y. Supp. 334; Forest City Ins. Co. *v.* Hardesty, 182 Ill. 39, 55 N. E. Rep. 139, *affg.* 77 Ill. App. 413; Stone *v.* Granite State Ins. Co., 69 N. H. 438, 45 Atl. Rep. 235; Hoffman *v.* Aetna Ins. Co., 32 N. Y. 413; Wallace *v.* German-American Ins. Co., 41 Fed. Rep. 742; Boon *v.* Aetna Ins. Co., 40 Conn. 575.

4. London Assur. Co. *v.* Thompson, 170 N. Y. 94, 62 N. E. Rep. 1066, *affg.* 54 App. Div. 637, 67 N. Y. Supp. 1138.

RULE 18.

If Policy Requires Construction Courts Will Sustain the Contract in Preference to Making it Forfeit.

If an insurance policy has inconsistent provisions or is so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract.

McMaster *v.* New York Ins. Co., 183 U. S. 25, 40, 22 Sup. Ct. Rep. 10; Snyder *v.* Dwelling-House Ins. Co., 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905; Quinn Ins. Co. *v.* Excelsior Milling Co., Kans. , 76 Pac. Rep. 423. And see Rule 17 and cases cited thereunder.

RULE 19.

Courts Will Follow Construction of the Parties.

Where language is doubtful or ambiguous the courts will follow the construction of the parties as shown by their acts.

Insurance Co. *v.* Dutcher, 95 U. S. 269. And see Steen *v.* Niagara Ins. Co., 89 N. Y. 315; Amazon Ins. Co. *v.* Wall, 31 Ohio St. 628; Frankenthal *v.* Guardian Assur. Co., 76 Mo. App. 15; Lawrence *v.* Niagara Ins. Co., 2 App. Div. 267, 37 N. Y. Supp. 811, *affd.* on opinion below, 154 N. Y. 752.

RULE 20.

Conflict Between Written or Descriptive Part and Printed Conditions.

The specially written or descriptive part of the policy, inserted in the blank left for the purpose, or a "rider," prevails over and supersedes the printed terms and conditions wherever they conflict;¹ for instance, where building is insured as a paint shop or a factory, and benzine is necessarily used in such occupation, the printed clause prohibiting the use of benzine is rendered inoperative;² and so where the description covers and includes the prohibited article;³ and so where the property is described in substance as belonging to others than the insured it renders inoperative the clause requiring sole and unconditional ownership;⁴ but this rule applies only where the conflict is irreconcilable.⁵

1. *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Fire Ins. Assoc. v. Merchants' Transp. Co.*, 66 Md. 339; *Goss v. Citizens' Ins. Co.*, 18 La. Ann. 97; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Mascott v. Granite State Ins. Co.*, 68 Vt. 253, 35 Atl. Rep. 75; *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. Rep. 862; *Johnson v. Insurance Co.*, 118 N. C. 643; *Tubb v. Insurance Co.*, 106 Ala. 651; *Broadwater v. Lion Ins. Co.*, 34 Minn. 465; *Russell v. Manufacturers & B. Ins. Co.*, 50 Minn. 409, 52 N. W. Rep. 906; *Joy v. Pennsylvania Ins. Co.*, 35 Mo. App. 165; *Reynolds v. Commerce Ins. Co.*, 47 N. Y. 597; *Haws v. St. Paul F. & M. Ins. Co.*, 130 Pa. St. 113, 15 Atl. Rep. 915; *Schreiber v. German-American Ins. Co.*, 43 Minn. 367, 45 N. W. Rep. 708.

2. *Mascott v. First National Ins. Co.*, 69 Vt. 116, 37 Atl. Rep. 255; *Viele v. Germania Ins. Co.*, 26 Iowa, 91; *Archer v. Merchants' Ins. Co.*, 43 Mo. 434; *Faust v. American Ins. Co.*, 91 Wis. 158.

3. *American Central Ins. Co. v. Greene*, 16 Tex. Civ. App. 531, 41 S. W. Rep. 74; *Mascott v. First National Ins. Co.*, 69 Vt. 116, 37 Atl. Rep. 255; *Harper v. Albany Ins. Co.*, 17 N. Y. 194; *Hall*

v. Insurance Co. of N. A., 58 N. Y. 292; *Collins v. Insurance Co.*, 79 N. C. 279; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Stout v. Commercial Union Assur. Co.*, 12 Fed. Rep. 554; *Barnum v. Merchants' Ins. Co.*, 97 N. Y. 188; *Plinsky v. Germania Ins. Co.*, 32 Fed. Rep. 47; *Cassimus v. Scottish Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464; *Phoenix Ins. Co. v. Walters*, 24 Ind. App. 87, 56 N. E. Rep. 257. See "Exemptions, Exceptions and Limitations."

4. *West Branch Lumbermen's Exchange v. American Ins. Co.*, 183 Pa. St. 366, 38 Atl. Rep. 1081, 27 Ins. L. J. 305. And see *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72.

5. *Jackson v. British-American Ins. Co.*, 106 Mich. 47, 63 N. W. Rep. 899; *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. Rep. 708, 26 Ins. L. 708. See Rule 9.

RULE 21.

Admission of Parol Evidence to Explain Ambiguity.

When meaning of the insurance contract is doubtful or capable of two meanings the circumstances surrounding the parties when the contract was made and affecting the subject to which it relates, form a sort of context that may be resorted to in arriving at the meaning of the contract;¹ while in such a case parol evidence is admissible to place the court in position of the parties to enable it to appreciate the force of the words used, neither party can be permitted to state what he understood or intended,² except as bearing on an issue of a conditional delivery of the contract itself as a contract.³

1. *Bole v. New Hampshire Ins. Co.*, 159 Pa. St. 53, 28 Atl. Rep. 205, 23 Ins. L. J. 857; *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. Rep. 708, 26 Ins. L. J. 708; *McKeesport Machine Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. Rep. 16; *Phoenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265, affd., 182 Ill. 33; *New York Belting Co. v. Washington Ins. Co.*, 10 Bosw. 428. And see *Reynolds v. Commerce Ins. Co.*, 47

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N. Y. 606; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379; *Mayor v. Exchange Ins. Co.*, 3 Keyes, 436; *Weisenberger v. Harmony Ins. Co.*, 56 Pa. St. 442; *Haws v. Philadelphia Fire Assoc.*, 114 Pa. St. 431; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Liverpool, L. & G. Ins. Co. v. Van Os*, 63 Miss. 431; *L'Engle v. Scottish Union & Nat. Ins. Co.*, Fla. , 37 So. Rep. 462.

2. *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307, 43 N. E. Rep. 856; *Rickerson v. German-American Ins. Co.*, 6 App. Div. 550; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. 427, 441.

3. *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 424, 55 N. E. Rep. 936. And see *Hartford Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. Rep. 189.

RULE 22.

When Language Plain and Clear Evidence of Usage or Custom not Admissible.

Where the contract embodies in clear and positive terms the intention of the parties it cannot be varied by evidence of usage or custom.

Grace v. American Central Ins. Co., 109 U. S. 283; *Hearne v. Ins. Co.*, 20 Wall. 488; *Waxahachie First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461; *Phoenix Ins. Co. v. Munger*, 49 Kans. 178, 30 Pac. Rep. 120; *Bornzewski v. Middlesex Assur. Co.*, Mass. , 72 N. E. Rep. 250; *Home Ins. Co. v. Continental Ins. Co.*, 180 N. Y. 389, 73 N. E. Rep. 65; *Ohio Farmers' Ins. Co. v. Vogel*, Ind. App. , 73 N. E. Rep. 612.

RULE 23.

When Evidence of Usage or Custom Admissible — When Binding.

Parol evidence of usage or custom may be admissible in cases of doubtful meaning when the custom is reasonable, uniform, and well settled;¹ but it is not binding upon the insured when it was not known to him at time of the issue of the policy, unless it was so generally known as to raise a presumption that the contract was made in reference to it;² the phrase "any usage or custom of trade or manufacture to the con-

trary notwithstanding " in the printed condition standard form relating to prohibited articles like gasoline, etc., has no application to a policy insuring household goods; it cannot be construed to exclude usage or custom in domestic affairs.³

1. *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413, 424, 55 N. E. Rep. 936. And see *Westfield Cigar Co. v. Insurance Co. of N. A.*, 169 Mass. 382, 47 N. E. Rep. 1026.

2. *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307, 43 N. E. Rep. 856; *American Central Ins. Co. v. Greene*, 16 Tex. Civ. App. 531, 41 S. W. Rep. 74.

3. *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307, 43 N. E. Rep. 856; *American Central Ins. Co. v. Greene*, 16 Tex. Civ. App. 531, 41 S. W. Rep. 74.

RULE 24.

When Usage or Custom Presumed to Enter into Intention.

Custom or usage is presumed to enter into the intention when it is found as a fact not only that it existed, but was uniform, reasonable, and well settled, and either known to the parties when the contract was made, or so generally known as to raise a presumption that they had it in mind at the time.

London Assur. Co. v. Thompson, 170 N. Y. 94, 99, 62 N. E. Rep. 1066. And see *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. Rep. 191.

RULE 25.

Evidence of Usage or Custom.

Usage or custom, when admissible, cannot be established by what a witness would do; he may testify only to what he had done or seen done;¹ and when it appears that evidence is based upon opinion rather than knowledge of a custom recognized notoriously and uni-

formly, and his knowledge is largely confined to practice of his own office, it is error to submit the question to a jury.²

1. *Rickerson v. Hartford Ins. Co.*, 149 N. Y. 307, 43 N. E. Rep. 856.

2. *Greenwich Ins. Co. v. Waterman*, 54 Fed. Rep. 839.

RULE 26.

Effect of the Word "Entire" on Divisibility of Contract.

Notwithstanding the use of the word "entire" in the standard form of policy, it is still divisible in a proper case, and while void in part by reason of a violation of a condition affecting such part, the balance of the insurance when separated or itemized remains unaffected and is recoverable,¹ but contract is severable only when separately itemized in value, amounts, or insurance.²

1. *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892, revg. on reargument 72 Hun, 519, 25 N. Y. Supp. 438; *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75, 25 S. W. Rep. 848; *Holloway v. Dwelling-House Ins. Co.*, 121 Mo. 87; *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, affd. on opinion below, 142 N. Y. 641; *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Adler v. Germania Ins. Co.*, 17 Misc. 347, 39 N. Y. Supp. 1070; *American Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. 114, 20 N. Y. Supp. 646. And see *Home Ins. Co. v. Connolly*, 104 Tenn. 93; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. Rep. 546; *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247; *Donley v. Glens Falls Ins. Co.*, App. Div. , 91 N. Y. Supp. 302. But see this volume, "Fraud or False Swearing;" "Iron Safe Clause;" and volume 2, "Increase of Risk;" "Vacant or Unoccupied." The distinction seems to be that when the violation affects the entire property, the policy is not severable. *Brehm Lumber Co. v. Svea Ins. Co.*, Wash. , 79 Pac. Rep. 34; *Herzog v. Palatine Ins. Co.*, Wash. , 79 Pac. Rep. 287. And see *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548; *St. Landry Mercantile Co. v. New Hampshire Ins. Co.*, La. , 38 So. Rep. 87; *Southern Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. Rep. 821.

2. *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452. And see *Burr v. German Ins. Co.*, 84 Wis. 76, 54 N. W.

Rep. 22; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. Rep. 18.

In some States the word "entire" is differently construed, and held controlling. *Martin v. Insurance Co. of N. A.*, 57 N. J. L. 623, 31 Atl. Rep. 213; *McWilliams v. Cascade Ins. Co.*, 7 Wash. 48, 34 Pac. Rep. 140. And see *Germania Ins. Co. v. Schild*, 69 Ohio St. 136, 68 N. E. Rep. 706. And that policy is entire and not divisible, see also *Thomas v. Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. Rep. 672; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959; *Southern Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. Rep. 821; *Day v. Charter Oak Ins. Co.*, 51 Me. 91. That it is divisible, and may be void in part, and valid and enforceable in part, when separated or itemized, see also *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 29 S. W. Rep. 1063, 29 L. R. A. 706; *Sullivan v. Hartford Ins. Co.*, 89 Tex. 665, 36 S. W. Rep. 73; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. Rep. 606; *Sun Mutual Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. Rep. 186; *Georgia Home Ins. Co. v. Brady (Tex.)*, 41 S. W. Rep. 513; *Home Ins. Co. v. Bernstein*, 55 Nebr. 260, 75 N. W. Rep. 839; *Johansen v. Home Ins. Co.*, 54 Nebr. 548, 74 N. W. Rep. 866; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Continental Ins. Co. v. Ward*, 50 Kans. 346, 31 Pac. Rep. 1079; *Kansas Farmers' Ins. Co. v. Saindon*, 53 Kans. 623, 36 Pac. Rep. 983; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. Rep. 932; *Firemen's Fund Ins. Co. v. Baker*, 6 Colo. App. 535, 41 Pac. Rep. 513; *Phillips v. Ohio Farmers' Ins. Co.*, 2 Ohio Dec. 571; *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. Rep. 828; *Cooper v. Insurance Co. of Pa.*, 96 Wis. 362, 71 N. W. Rep. 606; *Thurber v. Royal Ins. Co.*, 1 Marv. (Del.) 251, 40 Atl. Rep. 1111; *Manchester Assur. Co. v. Feibelman*, 118 Ala. 308. But compare *Burr v. German Ins. Co.*, 84 Wis. 76, 54 N. W. Rep. 22; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. Rep. 18.

RULE 27.

Divisibility of Contract not Affected by Entirety of Premium.

Entirety of premium does not necessarily prove that the contract is indivisible, and where it appears from the terms of the policy that distinct items or classes of property are separately insured, the policy may be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to

exclude by the condition which is broken does not apply to the other items or classes of property.

Taylor *v.* Anchor Ins. Co., 116 Iowa, 625, 88 N. W. Rep. 807. And see Kahler *v.* Insurance Co., 106 Iowa, 308; Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. Rep. 867. But see exceptions in note under Rule 26.

RULE 28.

Distinction Between Matters of Interpretation and Remedy as to What Law Governs.

Matters relating to the validity, execution, and interpretation of the contract are governed by the law of the place in which it is made; those relating to the remedy, by the law of the place in which the suit is brought,¹ unless the contracting parties clearly appear to have had some other law in view.²

1. Lancashire Ins. Co. *v.* Barnard, 111 Fed. Rep. 702, 49 C. C. A. 559; Thompson *v.* Traders' Ins. Co., 169 Mo. 12, 68 S. W. Rep. 889.

2. Western Mass. Ins. Co. *v.* Hilton, 42 App. Div. 52, 56, 58 N. Y. Supp. 996, citing Liverpool S. Co. *v.* Phoenix Ins. Co., 129 U. S. 397; Milliken *v.* Pratt, 125 Mass. 374.

RULE 29.

Same Subject — Rights and Remedies — General Rule.

The *rights* of the parties to the contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed. If a contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the

validity, obligation, and effect of the contract;¹ the general rule is that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there in a legal sense.²

1. *Hyde v. Goodnow*, 3 N. Y. 266, 269.

2. *First Nat. Bank v. Shaw*, 61 N. Y. 293, 294. And see *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 448; *London Assur. Co. v. Compagnia Moraghens*, 167 U. S. 161; *Canton Ins. Co. v. Woodside*. 90 Fed. Rep. 301.

RULE 30.

Contract Made When Mailed.

Where the assured or his broker and agent forwards an application for insurance to a company at its office in another State, by whom it is received and accepted, and the policy is made, signed, and issued in such State, the contract is complete when mailed to the broker or agent, and is governed by the law of such State;¹ this rule may be affected by statute.²

1. *Commonwealth Mut. Ins. Co. v. Wm. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. Rep. 516; *Commonwealth Ins. Co. v. Fairbanks Canning Co.*, 173 Mass. 161, 53 N. E. Rep. 373. And see *State Ins. Co. v. Brinkley Stave Co.*, 61 Ark. 1, 31 S. W. Rep. 157, 29 L. R. A. 712; *Gibson v. Connecticut Ins. Co.*, 77 Fed. Rep. 561; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Lamb v. Bowser* (U. S. Cir.), 7 Biss. 315; *Northampton Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Western v. Genesee Ins. Co.*, 12 N. Y. 258; *Galloway v. Standard Ins. Co.*, 45 W. Va. 237, 31 S. E. Rep. 969, 28 Ins. L. J. 125; *Western Mass. Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996; *Baker v. Spaulding*, 71 Vt. 169, 42 Atl. Rep. 982, 28 Ins. L. J. 470.

2. See Rule 4.

RULE 31.

Making of Contract May be Conditional — Intention.

When an application is made to an authorized agent in one State, who forwards it to the home office of the company in another State, where it is accepted, and policy is sent to the agent to be delivered upon payment of the premium, the contract is not complete until delivery and payment of the premium, and is, therefore, regarded as made in the former State where the application was made and in which the policy was delivered, and is governed by its laws;¹ policy may be construed in accordance with the intention.²

1. *Millard v. Brayton*, 177 Mass. 533, 59 N. E. Rep. 436, 52 L. R. A. 117. And see *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Lancashire Ins. Co. v. Barnard*, 111 Fed. Rep. 702, 49 C. C. A. 559. And completion of the contract as dependent upon delivery or place of delivery. See also *Mutual Ins. Co. v. Robison*, 54 Fed. Rep. 580; *Hicks v. National Ins. Co.*, 60 Fed. Rep. 690, 9 C. C. A. 215; *Equitable Assur. Co. v. Winning*, 58 Fed. Rep. 541, 7 C. C. A. 359; *Carrollton Furniture Co. v. American Indemnity Co.*, 115 Fed. Rep. 77; *Wood v. Cascade Ins. Co.*, 8 Wash. 427; *Pietri v. Sequenot*, 96 Mo. App. 258, 69 S. W. Rep. 1055; *State Ins. Co. v. Brinkley Stave Co.*, 61 Ark. 1, 31 S. W. Rep. 157, 29 L. R. A. 712; *Equitable Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. Rep. 822; *Antes v. State Ins. Co.*, 61 Nebr. 55, 84 N. W. Rep. 412; *Perry v. Insurance Co.*, 67 N. H. 291, 33 Atl. Rep. 731. And delivery to an agent of insured. See *Hicks v. National Ins. Co.*, 60 Fed. Rep. 690, 9 C. C. A. 215; *Equitable Ins. Co. v. Winning*, 58 Fed. Rep. 541, 7 C. C. A. 359. There is an obvious distinction between a case where a policy is made and issued as a complete enforceable contract at time of its issue, and a case where, either by its express terms or by some special condition, it does not take effect until payment of the premium and its delivery. *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. W. Rep. 849.

2. *Davis v. Aetna Ins. Co.*, 67 N. H. 218, 34 Atl. Rep. 464. And see *Western Mass. Ins. Co. v. Hilton*, 42 App. Div. 52, 58 N. Y. Supp. 996.

RULE 32.**When Policy Required to be Countersigned.**

When policy is required to be countersigned by an authorized agent, it is regarded as made and issued in the State where thus countersigned, and governed by its laws.

Gibson v. Connecticut Ins. Co., 77 Fed. Rep. 561; *Todd v. State Ins. Co.*, 11 Phila. (Pa.) 355; *Re Breiting's Estate*, 78 Wis. 33, 46 N. W. Rep. 891, 47 N. W. Rep. 17; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 416; *Haebner v. Eagle Ins. Co.*, 10 Gray (Mass.), 131; *Antes v. State Ins. Co.*, 61 Nebr. 55, 84 N. W. Rep. 412; *Galloway v. Standard Ins. Co.*, 45 W. Va. 237, 31 S. E. Rep. 969; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366.

RULE 33.**Action on Policy in Another State than where Issued and Property Situate.**

A policy of insurance made and issued in a State where the property covered thereby is situated must be construed in an action in another State with reference to the laws of the former.

King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 41 N. E. Rep. 277. And see *Smith v. California Ins. Co.*, 87 Me. 190, 32 Atl. Rep. 872, previous appeal, 85 Me. 348; *Gibson v. Connecticut Ins. Co.*, 77 Fed. Rep. 561.

RULE 34.**When Policy Void by Express Terms of a Statute.**

A policy issued and delivered in a State upon property there situated, but void by express terms of a statute in such State, is invalid everywhere, and such invalidity may be set up as a defense to an action

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upon the policy brought in another State where the company was incorporated.

Wood *v.* Cascade Ins. Co., 8 Wash. 427, 36 Pac. Rep. 267.
And see Hyde *v.* Goodnow, 3 N. Y. 266.

RULE 35.

No Defense to Action on Policy that Company Has not Complied with Statutory Requirements of State where Suit Brought.

It is no defense to an action brought in one State, upon a policy of insurance made and issued in another State, that the company or its agent has not complied with laws of the former State governing foreign insurance companies.

Northampton Ins. Co. *v.* Tuttle, 40 N. J. L. 476. And see Columbia Ins. Co. *v.* Kinyon, 37 N. J. L. 33; Marine Ins. Co. *v.* St. Louis & I. M. R. Co., 41 Fed. Rep. 643; Seamans *v.* Knapp Co., 89 Wis. 171, 61 N. W. Rep. 757; Western Mass. Ins. Co. *v.* Hilton, 42 App. Div. 52, 58 N. Y. Supp. 996. And see Hewins *v.* London Assur. Co., 184 Mass. 177, 68 N. E. Rep. 62.

RULE 36.

Rights of Parties When Fixed — Not Affected by Subsequent Statute.

When an act forfeiting the insurance, under the conditions of the policy, has been done or consummated, the rights of the parties become fixed, and are not affected by subsequent legislative enactment.¹ So the rights of parties are fixed when fire occurs.²

1. Elliott *v.* Farmers' Ins. Co., 114 Iowa, 153, 86 N. W. Rep. 224.

2. Swank *v.* Farmers' Ins. Co., Iowa, , 102 N. W. Rep. 429.

CHAPTER TWELFTH.

Standard Forms and Statutory Provisions.

- TITLE 1.** Standard forms of fire insurance contract and forms of riders or clauses occasionally or usually attached.
2. Statutory provisions.

TITLE I.

Standard Forms of Fire Insurance Contract and Forms of Riders, Etc.

Standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	† Pennsylvania,
* Missouri,	Rhode Island.
New Jersey,	

(The figures are inserted to correspond with numbering of the lines as usually printed in the policies as issued.)

..... INSURANCE COMPANY OF

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED
AND OF DOLLARS PREMIUM, does insure
for the term of, from the day of,
190., at noon, to the day of, 190., at
noon, against all direct loss or damage by fire, except as here-
inafter provided,

To an amount not exceeding dollars, to the fol-

* The form in Missouri is same except that at the end is added the following clause, "It is hereby agreed that any provision of this policy in conflict with the statutes of the State of Missouri are distinctly held and acknowledged to be inoperative and of no avail."

† See note, page 2.

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lowing described property while located and contained as described herein, and not elsewhere, to wit:

.....
.....
.....

(1) This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for (2) depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if (3) they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, (4) estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, (5) and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be (6) no abandonment to this company of the property described.

(7) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material (8) fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not (9) truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or (10) the subject thereof, whether before or after a loss.

(11) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured (12) now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered (13) in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole (14) or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be (15) increased by any means within the control or knowledge of the insured; or if mechanics be employed in

building, altering, or (16) repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other (17) than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in (18) fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with (19) the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this (20) policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the (21) interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal (22) process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating (23) gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or (24) manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, (25) dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine (26) or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United (27) States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, (28) provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building (29) herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for (30) ten days.

(31) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or (32) commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all (33) reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring (34) premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but (35) liability for direct damage by lightning may be assumed by specific agreement hereon.

(36) If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents (37) shall immediately cease.

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(38) This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; (39) nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, (40) jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, (41) tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance (42) or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor (43) for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole (44) insurance on the building described.

(45) If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and (46) a warranty by the insured.

(47) In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this (48) company.

(49) This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed (50) term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

(51) This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of (52) such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been (53) actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the (54) customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* (55) premium.

(56) If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or (57) corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the (58) conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such (59) interest as shall be written upon, attached, or appended hereto.

(60) If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed,

(61) that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall (62) for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such (63) excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears (64) to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be (65) liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time (66) of fire, whether the same cover in new location or not.

(67) If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property (68) from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, (69) make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, (70) within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this (71) company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; (72) the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; (73) all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the (74) descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property (75) since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were (76) occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or (77) machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not (78) interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has (79) examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary (80) public shall certify.

(81) The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property (82) herein described, and submit to examinations under oath by any person named by this company, and subscribe the

same; and, (83) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (84) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall (85) permit extracts and copies thereof to be made.

(86) In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent (87) and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent (88) and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and (89) damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine (90) the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the (91) expenses of the appraisal and umpire.

(92) This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any (93) requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss (94) shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein (95) required have been received by this company, including an award by appraisers when appraisal has been required.

(96) This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for (97) loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole (98) insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application (99) of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by (100) agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed (101) hereon.

(102) If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or (103) municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the (104) insured for the loss resulting therefrom, and such

right shall be assigned to this company by the insured on receiving such (105) payment.

(106) No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after (107) full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

(108) Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and (109) wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

(110) If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, (111) membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may (112) be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, this company has executed and attested these presents this day of, 190...

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190...

....., Agent.

FORMS OF FIRE INSURANCE CONTRACT, ETC. 481

MICHIGAN STANDARD POLICY.

No.

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..... INSURANCE COMPANY OF

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF DOLLARS PREMIUM, does insure for the term of, from the day of, 190., at noon, to the day of, 190., at noon, against all direct loss or damage by fire, except as hereinafter provided,

To an amount not exceeding dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

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(1) This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for (2) depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if (3) they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, (4) estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, (5) and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be (6) no abandonment to this company of the property described.

(7) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material (8) fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not (9) truly stated herein; or in case of any fraud or false

swearing by the insured touching any matter relating to this insurance or (10) the subject thereof, whether before or after a loss.

(11) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured (12) now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered (13) in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole (14) or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be (15) increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or (16) repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other (17) than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in (18) fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with (19) the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this (20) policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, (21) title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal (22) process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or (23) vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture (24) to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, (25) fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, (26) phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which (27) last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and (28) lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended (29) for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days, provided a loss shall occur on the (30) property insured while such breach of con-

dition continues, or such breach of condition is the primary or contributory cause of the loss.

(31) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, (32) or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable (33) means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring (34) premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but (35) liability for direct damage by lightning may be assumed by specific agreement hereon.

(36) If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents (37) shall immediately cease.

(38) This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; (39) nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, (40) jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, (41) tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance (42) or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor (43) for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole (44) insurance on the building described.

(45) If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and (46) a warranty by the insured as to material facts.

(47) In any matter relating to the procuring of this insurance no person, unless duly authorized in writing, shall be deemed the agent (48) of this company.

(49) This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed (50) term; provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

(51) This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of (52) such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having

been (53) actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary (54) short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* (55) premium.

(56) If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or (57) corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions (58) hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such (59) interest as shall be written upon, attached or appended hereto.

(60) If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, (61) that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, (62) for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such (63) excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears (64) to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be (65) liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time (66) of fire, whether the same cover in new location or not.

(67) If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property (68) from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, (69) make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, (70) within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, (71) signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; (72) the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; (73) all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions (74) and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property

(75) since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were (76) occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or (77) machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested (78) in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has (79) examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary (80) public shall certify.

(81) The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property (82) herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, (83) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (84) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall (85) permit extracts and copies thereof to be made.

(86) In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent (87) and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent (88) and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and (89) damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall be *prima facie* (90) evidence of the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the (91) expenses of the appraisal and umpire.

(92) This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any (93) requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss (94) shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein (95) required have been received by this company, including an award by appraisers when appraisal has been required.

(96) This company shall not be liable under this policy for a greater proportion of any loss on the described property, or

for (97) loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole (98) insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application (99) of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by (100) agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed (101) hereon.

(102) If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, (103) this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the (104) insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such (105) payment.

(106) No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after (107) full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

(108) Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and (109) wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

(110) If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, (111) membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may (112) be written or printed upon, attached or appended hereto.

The Directors and Agents of the Company shall in no case be responsible either on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the Company; nor can their personal property be attached on account of any alleged loss by the assured.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as

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to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, this company has executed and attested these presents this day of, 190...

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190...

....., Agent.

WISCONSIN STANDARD POLICY.

No. \$.....

..... INSURANCE COMPANY OF

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF DOLLARS PREMIUM, does insure for the term of, from the day of, 190., at noon, to the day of, 190., at noon, against all direct loss or damage by fire, except as hereinafter provided,

To an amount not exceeding dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

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(1) Except when otherwise provided by statute, this company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according (2) to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment (3) or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or

damage having been thus determined, the sum for which this company is liable (4) pursuant to this policy shall be payable sixty days after due notice and proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or (5) any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after (6) the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

(7) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or (8) circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated (9) herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, (10) whether before or after a loss.

(11) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has (12) or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by (13) this policy, or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than (14) ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the (15) control or knowledge of the insured, or if mechanics be employed in building, altering, or repairing the within described premises (16) for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the (17) subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal (18) property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be (19) commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change (20) other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of (21) occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise;

or if (22) this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for (23) use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on (24) the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five (25) pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability (26) than kerosene oil of the Wisconsin standard (which last may be used for lights and kept for sale according to law but in (27) quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from (28) artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or (29) unoccupied and so remain for ten days and continuing until the time of the fire.

(30) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military (31) or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to (32) save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless (33) fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage (34) by lightning may be assumed by specific agreement hereon.

(35) If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents (36) shall immediately cease.

(37) This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, (38) unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, (39) manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or (40) property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law (41) regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any (42) greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance (43) on the building described.

(44) If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a (45) warranty by the insured.

(46) This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, (47) provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

(48) This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such (49) cancellation. Unless during a time in which the hazard shall be increased solely by the act of God, and in such case and during (50) such time of such increase of hazard the company shall not cancel this policy except upon sixty days' notice of such cancellation (51) without the consent of the assured. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium (52) having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company (53) retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain (54) only the pro rata premium.

(55) If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation (56) having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions (57) hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest (58) as shall be written upon, attached, or appended hereto.

(59) If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that (60) part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for (61) the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess (62) of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the (63) value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable (64) beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, (65) whether the same cover in new location or not.

(66) If fire occur the insured shall give immediate notice of

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any loss thereby in writing to this company, protect the property from (67) further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete (68) inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days (69) after the fire, unless such time is extended by agreement with the company through the local agent, or any other authorized agent (70) or any adjuster acting for such company concerning such loss, shall render a statement to this company, signed and sworn to by (71) said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and (72) of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all (73) other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies, (74) any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, (75) by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and (76) shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall (77) also, if required, furnish a certificate of a magistrate or notary public residing in the county where the insured property is (78) located (not interested in the claim as a creditor or otherwise, nor related to the insured) stating that he has examined the circumstances (79) and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

(80) The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property (81) herein described, and submit to examinations all under oath by any person named by this company, and subscribe the same; and, (82) as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies (83) thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit (84) extracts and copies thereof to be made.

(85) In the event of disagreement in the amount of loss the same shall, as above provided, be ascertained by two competent and (86) disinterested appraisers, who shall be residents of this state unless otherwise agreed by the parties hereto; the insured and this (87) company each selecting one, within thirty-five

days after the mailing of proof of loss to said company, as herein stated, and in (88) case either party fails to select an appraiser within such time the other appraiser and the umpire selected, as herein provided, (89) may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been (90) chosen; and the two so chosen shall first select a competent and disinterested umpire, provided that if after five days the two appraisers (91) cannot agree on such an umpire, the presiding judge of the circuit court of the county wherein the loss occurs may appoint (92) such an umpire, upon application of either party in writing by giving five days' notice thereof in writing to the other party. (93) Unless within thirty days after proof of the loss has been mailed to the company, either party, the assured or the company, shall (94) have notified the other in writing that such party demands an appraisal, such right of an appraisal shall be waived; the appraisers (95) together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit (96) their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties (97) thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

(98) This company shall not be held to have waived, except as above expressly provided for, any provision or condition of this policy (99) or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein (100) provided for; and the loss shall become payable sixty days after the notice and proof of the loss herein required have been received (101) by this company.

(102) This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss (103) by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, (104) whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance (105) under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or (106) condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

(107) If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, (108) this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of re-

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covery by the insured (109) for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

(110) Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and (111) wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

(112) If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, (113) policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be (114) written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. Up to the time of the delivery of this policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, this company has executed and attested these presents this day of, 190...

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190..
....., Agent.

MAINE STANDARD POLICY.

No.

\$.....

..... INSURANCE COMPANY OF

This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens.

IN CONSIDERATION OF DOLLARS, to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure and legal representatives against loss or damage by fire, to the amount of dollars.

.....

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of, beginning on the day of, in the year nineteen hundred and, at noon, and continuing until the day of, in the year hundred and, at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be VOID if any material fact or circumstance stated in writing has not been fairly represented by the insured,—or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company,—or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter,—or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the

said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment, running in whole or in part extra time, except that such establishments may run in whole or in part extra hours not later than nine o'clock P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company, either before or after the loss,—or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law,—or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal-oil may be used for lighting, and in dwelling-houses, kerosene oil stoves may be used for domestic purposes—to be filled when cold, by daylight and with oil of lawful fire test only.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a STATEMENT in writing, signed and sworn to by the insured, shall be forthwith* rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, *which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided*, or replace the property with other of the same kind and goodness,—or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandon-

* The words "within a reasonable time" substituted for "forthwith," in 1905.

ment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

If there shall be any OTHER INSURANCE on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

This policy may be CANCELED at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected

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by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties *shall be a condition precedent to any right of action in law or equity to recover for such loss*; but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this state unless commenced within two years from the time the loss occurred.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, the said company has caused this policy to be signed by its managers at their office, in....., this day of, 190..

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190..
.....
Agent.

MASSACHUSETTS STANDARD POLICY.

No. \$.

..... INSURANCE COMPANY OF

This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens.

IN CONSIDERATION OF DOLLARS, to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure and legal representatives against loss or damage by fire, to the amount of dollars.

.....
.....
.....

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of, begin-

ning on the day of, in the year nineteen hundred and, at noon, and continuing until the day of, in the year hundred and, at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be VOID if any material fact or circumstance stated in writing has not been fairly represented by the insured,—or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company,—or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter,—or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment, running in whole or in part extra time, except that such establishments may run in whole or in part extra hours not later than nine o'clock P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company, either before or after the loss,—or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law,—or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal-oil may be used for lighting, and in dwelling-houses, kerosene oil stoves may be used for domestic purposes—to be filled when cold, by daylight and with oil of lawful fire test only.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a STATEMENT in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, *which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided*, or replace the property with other of the same kind and goodness,—or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

If there shall be any OTHER INSURANCE on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or

owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

This policy may be CANCELED at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties *shall be a condition precedent to any right of action in law or equity to recover for such loss*; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this Commonwealth unless commenced within two years from the time the loss occurred.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, the said INSURANCE COMPANY has caused this policy to be signed by its managers at their office, in, this day of, 190..

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190..
Agent.

FORMS OF FIRE INSURANCE CONTRACT, ETC. 501

MINNESOTA STANDARD POLICY.

No. \$.

..... INSURANCE COMPANY OF

IN CONSIDERATION OF DOLLARS, to be paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure and legal representatives against loss or damage by fire, to the amount of dollars.

.....
.....

Bills of exchange, notes, accounts, evidence and securities of property of every kind, books, wearing apparel, plate, money, jewels, metals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

(1) Said property is insured for the term of beginning on the day of, in the year nineteen (2) hundred and, at noon, and continuing until the day of in the year nineteen hundred and (3), at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots or any military or usurped power whatever; (4) the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except in case of total loss on buildings, but not to (5) include loss or damage caused by explosion of any kind unless fire ensues, and then to include that caused by fire only.

(6) The policy shall be void if any material fact or circumstance stated in writing has not been fairly represented (7) by the insured, or if the assured now has or shall hereafter make any other insurance on the said (8) property without the assent of the company, or if without such assent the property shall be removed, (9) except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall (10) be valid without such assent for five days thereafter, or if, without such assent, the situation or circumstances (11) affecting the risk, shall, by or with the knowledge, advice, agency or consent of insured, be so altered so as (12) to cause an increase of such risks, or if, without such assent, the property shall be sold or this policy assigned, (13) or if the premises hereby insured shall become vacant by the removal of the owner or occu-

pant, and so remain (14) vacant for more than thirty (39) days without such assent, or if it be a manufacturing establishment running in (15) whole or in part extra time, except that such establishment may run in whole or in part extra hours not later (16) than nine (9) o'clock p. m., or if such establishment shall cease operation for more than thirty (30) days without (17) permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company, either (18) before or after the loss, or if gunpowder or other articles subject to legal restrictions shall be kept in quantities (19) or manner different from those allowed or prescribed by law, or if camphene, benzine, naphtha or other (20) chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that (21) what is known as refined petroleum, kerosene or coal oil may be used for lighting, and in dwelling-houses (22) kerosene oil stoves may be used for domestic purposes, to be filled when cold, by daylight, and with oil of (23) lawful fire test only.

(24) If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable (25) exertions to save and protect the same.

(26) In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the (27) insured, shall be forthwith rendered to the company, setting forth the value of the property insured, except (28) in case of total loss on buildings the value of said buildings need not be stated, the interest of the insured (29) therein, all other insurance thereon in detail, the purposes for which and the persons by whom the building (30) insured, or containing the property insured, was used, and the time at which and manner in which the fire (31) originated so far as known to the insured. The company may also examine the books of account and vouchers (32) of the insured, and make extracts from the same.

(33) In case of any loss or damage the company, within sixty (60) days after the insured shall have submitted (34) a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which (35) amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided, or replace the (36) property with other of the same kind and goodness, or it may, within fifteen (15) days after such statement is (37) submitted, notify the insured of its intentions to rebuild or repair the premises or any portion thereof separately (38) insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the (39) same with reasonable expedition.

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(40) It is moreover understood that there can be no abandonment of the property insured to the company, (41) and that the company shall not in any case be liable for more than the sum insured, with interest thereon (42) from the time when the loss shall become payable, as above provided.

(43) If there shall be any other insurance on the property insured, whether prior or subsequent, the insured (44) shall recover on this policy no greater proportion of loss, except in case of total loss on buildings, sustained, (45) than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall (46) pay any loss, the insured shall assign to it to the extent of the amount so paid all rights to recover satisfaction (47) for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, (48) if requested, shall prosecute therefor at the charge and for the account of the company.

(49) If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any (50) person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's (51) right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay (52) according to the established scale of rates for any increase of risks not paid for by the insured; and whenever (53) this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability (54) exists as to the mortgagor or owner, and this company shall elect by itself, or with others, to pay the (55) mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the (56) company interested, upon such payment, the said mortgage, together with the note and debts thereby secured.

(57) This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled (58) to a return of the portion of the above premium remaining, after deducting the customary monthly short rates (59) for the time this policy shall have been in force. The company also reserves the right, after giving written (60) notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured (61) a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days (62) from such notice, and no mortgagee shall then have the right to recover as to such risks.

(63) In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to (64) agree as to

the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three (65) disinterested men, the company and the insured each choosing one out of three persons to be named by the (66) other, and the third being selected by the two so chosen; the award in writing by a majority of the referees (67) shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless (68) waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such (69) loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a (70) like capacity within four months.

(71) No suit or action against this company for the recovery of any claim by virtue of this policy shall (72) be sustained in any court of law or equity in this state unless commenced within two years from the time the (73) loss occurred.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at

In witness whereof, the said company has caused this policy to be signed by its managers, at their office in, this day of, 190..

THE INSURANCE COMPANY, BY

Countersigned at, this day of, 190..
.....
Agent.

NEW HAMPSHIRE STANDARD POLICY.

No. \$......

..... INSURANCE COMPANY OF

IN CONSIDERATION OF DOLLARS, to them paid by
the insured hereinafter named, the receipt whereof
Premium. is hereby acknowledged, do insure
against loss or damage by fire, to the amount of
Amount. Dollars.
.....

Property In-
sured.
.....

This company shall not be liable beyond the actual value of

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the insured property at the time any loss or damage happens, except on buildings totally destroyed, in which case the full amount of the limitation shall be paid.

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture, and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of, beginning on the day of, in the year nineteen hundred and, at noon, and continuing until the day of, in the year nineteen hundred and, at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except on buildings, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be VOID if any material fact or circumstance stated in writing has not been fairly represented by the insured; or if the insured, at the time of any loss, has any other insurance on the said property, without the assent in writing or in print of the company; or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter; or if the insured shall make any attempt to defraud the company, either before or after the loss; and this policy shall be VOID and INOPERATIVE during the existence or continuance of the acts or conditions of things stipulated against, as follows: if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if, without such assent, the said property shall be sold, or this policy assigned; or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent; or if it be a manufacturing establishment in which the works or machinery are operated more than the customary or legal working hours, or all night, without the written or printed assent of this com-

pany thereto; except that permission is hereby given to operate machinery extra hours, not later than 10 o'clock P. M., for the purpose of equalizing work, a competent man, other than the regular watchman, being kept in charge of those rooms in which shafting and belts are running, but where the machinery is not at work; or if such establishment shall cease operation for more than thirty days without permission in writing indorsed hereon; or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal-oil may be used for lighting.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

Insured to protect property in case of exposure to fire.

In case of any loss or damage under this policy, a STATEMENT in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, in detail, the interest of the insured therein, all other insurance thereon, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which, and the manner in which, the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same, and shall have access to the premises and property damaged. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as hereafter provided.

Statement by insured in case of loss.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness; or it may, within ten days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said

Payment of loss to be made within sixty days after proof, unless company elects to replace or repair.

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premises and proceed to rebuild or repair the same with reasonable expedition.

In case difference of opinion shall arise as to the amount of any loss under this policy other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final and binding on the parties.

The referees' fees shall be equally divided between the company and the insured.

If there shall be any OTHER INSURANCE on the property insured, valid or invalid, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

This policy may be CANCELED at any time at the request of the insured, who shall thereupon be entitled to a return of the

Apportionment
of loss in case of
other insurance.

Insured to as-
sign to company
claims against
third parties.

Rights of par-
ties in case the
policy is made
payable to a
mortgagee.

portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice; and no mortgagee shall then have the right to recover as to such risks. Mutual companies may vary this clause to suit their methods of business.

In case any special provisions or stipulations not enumerated or inserted above require mention in effecting insurance, such provisions or stipulations shall be legibly written or printed, and prominently and securely attached to this policy, and signed separately by the company or agent.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this State, unless commenced within one year from the time the loss occurred.

Chapter 170 of the Public Statutes is printed on the back of this policy contract, and hereby made a part thereof.

In witness whereof, this company has executed and attested these presents this day of, 190..; but the same shall not be binding unless countersigned by the duly Authorized Agent.. of said company at

THE INSURANCE COMPANY, BY

Countersigned at, this day of,
19... .., Agent.

INSURANCE LAWS OF NEW HAMPSHIRE.

Chapter 170 of the Public Statutes of New Hampshire.

SECTION 1. The form of policy and insurance contract now in force in the state is continued until the insurance commissioner shall change it. He is authorized to change the form of such contracts from time to time as he may think the public good requires. Any company using any other form of policy than the one prescribed shall forfeit its license.

SECT. 2. Descriptions of property and statements concerning its value and the title of the insured thereto in an applica-

FORMS OF FIRE INSURANCE CONTRACT, ETC. 509

tion for insurance or in an insurance policy shall not be treated as warranties. A policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, or unless the difference between the property as it was represented and the property as it really existed contributed to the loss; but the sum insured by the policy shall be taken to be such fractional part of the sum mentioned therein as the premium paid by the insured is of the premium which he ought to have paid, not exceeding in any event the value of the insured's interest in the property.

SECT. 3. If a company shall issue a policy upon an application prepared by a third person assuming to act as its agent or otherwise, it shall be charged with his knowledge of facts relating to the property insured as if they were stated in the application.

SECT. 4. A change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues.

SECT. 5. If insured buildings are totally destroyed, the sum insured shall be taken to be the value of the insured's interest therein, as such interest is described in the policy, unless over-insurance thereon was fraudulently obtained; if they are only partially destroyed, the insured shall be entitled to his actual damages, not exceeding the sum insured.

SECT. 6. In case of loss or damage of property insured, the party insured shall give notice thereof, in writing, to the secretary, a director, or an agent of the company, within thirty days.

SECT. 7. The company shall adjust the loss within fifteen days after the receipt of such notice.

SECT. 8. If the company decides to rebuild or repair the property destroyed or injured, it shall begin to do so within twenty days after adjusting the loss, and shall prosecute the work with reasonable diligence until it is completed.

SECT. 9. If the company neglects to adjust the loss within fifteen days after receiving notice of it, or to begin to rebuild or repair the property destroyed or damaged within twenty days after the adjustment of the loss, the insured may proceed to rebuild or repair at the expense of the company, who shall be liable for the reasonable expenses incurred in so doing and for the loss sustained by its neglect, not exceeding the amount insured; or the insured may commence an action upon the policy.

SECT. 10. If dissatisfied with such adjustment, the party insured may bring his action, by causing his writ to be served

on the proper officer or agent of such company, within six months after the reception of such notice in writing, and not afterward.

SECT. 11. Unless the company, in their notice of the amount of loss or damage determined by it, shall notify the insured that his action will be forever barred by law if his writ is not served on the company within six months next after the service of such notice upon him, he may bring his action at any time.

SECT. 12. The insured may bring his action in the county of his residence, notwithstanding anything to the contrary contained in the policy.

SECT. 13. If upon trial the insured recovers more than the amount determined by the insurers, he shall have judgment and execution immediately therefor, with interest and costs. If he recovers no more than such amount, the court may allow interest thereon, and such costs to either party as may be just; but execution shall not issue against the company within three months, unless by special order of court.

SECT. 14. A person having a claim against an insurance company not organized under the laws of the state, arising from a transaction with an agent of the company in the state, may sue therefor in the courts of the state. Service of any process pertaining to such action upon the insurance commissioner shall have the same effect as if the company were a domestic corporation and the service were lawfully made within the state upon its officers.

SECT. 15. If in such action the plaintiff shall recover a judgment, and the company does not pay it within thirty days after notice of it is given to the insurance commissioner, the commissioner may suspend the authority of the company to do business in the state. If the company or any of its agents shall issue a policy during such suspension, the company and agent shall each forfeit two hundred dollars for each policy so issued, but the policies shall be valid and binding, nevertheless.

SECT. 16. If a policy has been transferred or assigned by the assured to a person to hold absolutely or as collateral security, with the assent of the insurer, the assignee may bring an action thereon in his own name or in that of the assignor, and may recover the full amount due upon the policy for the benefit of whom it may concern.

SECT. 17. Copies of charters, by-laws, certificates, appointments, and other papers required by law to be filed in the office of the insurance commissioner, and certified by him, shall be competent evidence in the courts of this state.

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SECT. 18. This chapter shall be a part of every contract of insurance to which it is applicable, and shall be plainly printed in every such contract. No waiver of any part of it shall be set up by the insurer, and every stipulation in the contract in conflict with it shall be void.

CLAUSES IN GENERAL OR OCCASIONAL USE.

Average Clause.

This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to per centum (.....%) of the actual cash value of said property at the time such loss shall happen.

If the insurance under this policy be divided into two or more items this Average Clause shall apply to each item separately.

*Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.*

Average Clause with Exemption of Special Inventory or Appraisement in Certain Cases.

This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to per centum (.....%) of the actual cash value of said property at the time such loss shall happen.

In case of claim for loss on the property described herein not exceeding five per cent. (5%) of the maximum amount named in the policies written thereon and in force at the time such loss shall happen, no special inventory or appraisement of the undamaged property shall be required.

If the insurance under this policy be divided into two or more items these clauses shall apply to each item separately.

*Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.*

Clause Forbidding the Use of Electricity.

This entire policy shall be void if electricity is used for light, heat, or power in the above-described premises, unless written permission is given by this Company hereon.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Referring to the above.

Permission is hereby given for the use of electricity for light, heat, or power, it being understood and agreed that this insurance excludes any loss or damage to dynamos, excitors, lamps, switches, motors, or other electrical appliances or devices such as may be caused by electrical currents, artificial or natural, and will be liable only for such loss or damage to them as may occur in consequence of fire outside of the machines themselves.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Co-Insurance Clause for Floating Policy.

It is hereby declared and agreed that in case the property aforesaid in all the buildings, places, or limits included in this insurance, shall at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this Company shall pay and make good such a portion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen.

But it is at the same time declared and agreed, that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building, or buildings, place, or places, within the limits of this insurance, shall at the time of any fire be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, and shall not be liable for any loss unless the amount of such loss shall exceed the amount of such specific insurance or insurances, which said excess only is declared to be under the protection of this policy and subject to average, as aforesaid.

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It being the true intent and meaning of this agreement that this Company shall not be liable for any loss, unless the amount of such loss shall exceed the amount of the specific insurance or insurances, and then only for such excess, which said excess shall be the subject to average, as above.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Condition as to Incumbrances.

If the property, real or personal, covered by this policy be or become incumbered by a mortgage, trust deed, judgment or otherwise, this entire policy shall be void, unless otherwise provided by agreement indorsed hereon or added hereto.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Lightning Clause.

This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term Lightning, and in no case to include loss or damage by cyclone, tornado, or wind-storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; *provided*, however, if there shall be any other insurance on said property this Company shall be liable only *pro rata* with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Mortgagee Clause.

Loss or damage, if any, under this policy, shall be payable to as mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice

of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee], and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of claim.

Dated

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Mortgagee Clause (when Owner has no Interest in the Insurance).

It is hereby specially understood and agreed that this policy is for the benefit of the mortgagee [or trustee] only, the owner having no interest whatever therein.

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And it is further agreed that whenever this Company shall pay the mortgagee any sum for loss under this policy this Company shall at once be legally subrogated to all the rights of the mortgagee [or trustee] under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortgagee [or trustee] to recover the full amount of his claim.

.....[Signature of Insured.]

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Mortgagee Clause with Full Contribution.

Loss or damage, if any, under this policy, shall be payable to as mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy, or increase of hazard which shall come to the knowledge of said mortgagee [or trustee], and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

In case of any other insurance upon the within described property this Company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said

property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise.

Whenever this Company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of claim.

Dated

Attached to and forming part of Policy No. of the
 INSURANCE COMPANY, OF
 Agent.

Application and Survey Clause.

This policy is based upon an application and survey of the property on file which is hereby referred to as forming part of this policy.

Date of Application, ...

Where Filed, ...

Attached to and forming part of Policy No. of the
 INSURANCE COMPANY, OF
 Agent.

Assessment, Installment, or Credit Clause.

If any assessment or installment, or any part of the premium for which credit is given be not paid when due the whole premium shall be considered earned and be immediately payable, and this policy shall be void so long as any part of such premium remains unpaid.

Dated

Attached to and forming part of Policy No. of the
 INSURANCE COMPANY, OF
 Agent.

FORMS OF FIRE INSURANCE CONTRACT, ETC. 517

Co-Insurance Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than the actual cash value thereof, this Company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of such property.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Co-Insurance Clause (for application to specific items of Policy.)

If at the time of fire the whole amount of insurance on the property covered by the item of this policy on shall be less than the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item shall bear to the actual cash value of property covered by such item

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Co-Insurance Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said per cent. of the actual cash value of such property.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Co-Insurance Clause (for application to specific items of Policy).

If at the time of fire the whole amount of insurance on the property covered by the item of this pol-

icy on shall be less than per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item shall bear to the said per cent. of the actual cash value of the property covered by such item

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Co-Insurance and Limitation Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the said per cent. of the actual cash value of such property; *provided*, that in case the whole insurance shall exceed per cent. of the actual cash value of the property covered by this policy, this Company shall not be liable to pay more than its *pro rata* share of said per cent. of the actual cash value of such property; and should the whole insurance at the time of fire exceed the said per cent., a *pro rata* return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Co-Insurance and Limitation Clause (for application to specific items of Policy).

If at the time of fire the whole amount of insurance on the property covered by the item of this policy on shall be less than per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item shall bear to the said per cent. of the actual cash value of property covered by such item; *provided*, that in

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case the whole insurance on the property covered by said item shall exceed per cent. of the actual cash value of the same, this Company shall not on said item be liable to pay more than its *pro rata* share of said per cent. of the actual cash value of such property; and should the whole insurance on said item at the time of fire exceed the said per cent. a *pro rata* return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Value Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall exceed per cent. of the actual cash value thereof, this Company in case of loss or damage shall not be liable to pay more than its *pro rata* share of said per cent. of the actual cash value of such property; and should the whole insurance at the time of the fire exceed the said per cent., a *pro rata* return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF
.....Agent.

Percentage Value Clause (for application to specific items of Policy).

If at the time of fire the whole amount of insurance on the property covered by the item of this policy on shall exceed per cent. of the actual cash value thereof, this Company in case of loss or damage shall not be liable to pay more than its *pro rata* share of said per cent. of the actual cash value of said property; and should the whole insurance on said item at the time of fire exceed the said per cent., a *pro rata* return of premium on such excess of insurance from the time of the fire

to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No. of the
..... INSURANCE COMPANY, OF Agent.

Co-Insurance Clause.

In consideration of the premium for which this policy is issued, it is expressly stipulated that in the event of loss, this Company shall be liable for no greater proportion thereof than the sum hereby insured bears to 80% of the cash value of the property described herein at the time when such loss shall happen, nor more than the proportion which this policy bears to the total insurance. If this policy be divided into two or more items these conditions shall apply to each item separately. *Provided*, however, that if the aggregate claim for any loss shall not exceed five per cent. of the total insurance, no special inventory or appraisement of the undamaged property shall be required.

Iron Safe Clause.

The assured, under this policy, hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss.

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SOUTH DAKOTA STANDARD POLICY.

(In effect July 1, 1905.)

No. \$.

In consideration of dollars to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure and legal representatives and assigns against loss or damage by fire, to the amount of dollars to the following described property:

.....
.....
.....

Bills of exchange, notes, accounts, evidence and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specifically mentioned.

Said property is insured for the term beginning the day of in the year 19.. at noon, and continuing until the day of in the year 19.. at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except that the amount of insurance written herein upon any real property, including structures on land owned by another than the insured, shall be taken conclusively to be the true value of such property and the amount of loss sustained by, and the measure of damages of, the insured, in case the same is wholly destroyed without criminal fault on the part of the insured or his assigns.

This policy shall be void if any material fact or circumstance concerning the risk has been, or the amount of loss shall be, fraudulently concealed or misrepresented by the insured, or if

the insured now has or shall hereafter obtain any other insurance on said property without the assent of the company, or if without such assent the property shall be removed, except that if such removal shall be necessary for the preservation of the property from fire or water, this policy shall be valid without such assent for five days thereafter, or if without such assent the situation or conditions affecting the insured property shall be altered so as to materially increase the hazard, if such increase in hazard be occasioned by the act or agency of the insured, or if without such assent the insured shall sell and dispose of all insurable interests in the insured property, or if the premises hereby insured shall remain vacant and unoccupied for more than thirty days without the assent of the company, or if the subject of the insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than twenty consecutive days without permission in writing endorsed hereon, or if this policy be assigned before a loss without the assent of the insurer, or without such assent illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein, or if without the assent of the insurer there be kept on the above described premises dynamite, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, or petroleum or any of its products of greater inflammability than gasoline or kerosene oil of lawful fire test (which gasoline and kerosene may be kept and used for lights and usual domestic purposes) and kerosene may be kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lights filled by daylight or at a distance not less than ten feet from artificial light.

If the insured property shall be exposed to loss or damage by fire the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy the insured shall promptly give notice of such loss, and within sixty days from the time of the occurrence of the fire he shall make a

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statement in writing, sign and swear to the same, and render it to the company, setting forth substantially the property destroyed or damaged and a statement or estimate of the amount of his loss (except in case of total loss on buildings where the fire occurs without criminal fault on the part of the insured, or his assigns, in which case the value on the buildings need not be stated), the interest of the insured therein, all other insurance thereon, the purpose for which the building insured or containing the property insured was used, and by whom occupied, and the time and manner in which the fire originated as far as known to the insured. The company may also examine the vouchers, books and accounts of the insured and make extracts from the same. Should proof of loss not be furnished within six months from the date of loss this policy shall be void, unless such proof of loss shall have been waived.

In case of any loss or damage the company, within sixty days after the insured shall have submitted the statement as hereinbefore provided, shall either pay the amount for which it shall be liable, which amount, if not agreed upon or determined by the provisions of the policy, shall be ascertained by award of appraisers as hereafter provided, or shall replace the property with other of the same kind and quality (except in case of total loss of buildings as aforesaid where the amount of loss is fixed), or it may within fifteen days after such statement is submitted notify the insured of its intention to repair the premises or any portion thereof separately insured by this policy and shall thereupon enter upon said premises and proceed to repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as above provided. It shall be optional, however, with the company to take all or any part of the articles of personal property injured or damaged at the actual or appraised sound value thereof without deduction for damage. If there be any other insurance on the property insured, whether prior or subsequent, the insured shall

recover on this policy no greater proportion of loss sustained (except in case of total loss on buildings) than the sum hereby insured bears to the whole amount of insurance thereon.

Except in cases of loss where the amount thereof is fixed, as hereinbefore provided, in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

If this company shall claim that the fire was caused by the act or neglect of any third person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy shall be made payable to a mortgagee or trustee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's or trustee's rights to recover in case of loss on such real estate. Provided, that such mortgagee or trustee shall, on demand, pay according to the customary scale of rates for any increase of risk not paid for by the insured. And in case this policy shall have been issued to the owner of the insured property with the loss payable to a mortgagee, and the owner shall have done any act voiding the policy as herein provided, or the policy shall have been cancelled so that the company is not liable to him in any event, then the mortgagee,

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upon payment to him of the full amount secured by such mortgage, shall assign to the company or companies making such payment the mortgage, together with the note or debt secured thereby.

This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining after deducting the customary short rates for the time this policy shall have been in force.

The company also reserves the right to cancel this policy as to all risks subsequent to the expiration of five days after the giving of such notice in writing to the insured and to any mortgagee or trustee to whom this policy is made payable, and tendering to the insured the ratable proportion of the premium.

Any person who solicits insurance or issues policies of insurance, or procures applications therefor, shall be held to be, and considered, the general agent of the insurer issuing the policy or making a renewal thereof, except as to proof of loss and adjustment thereof, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract of insurance.

It shall be the duty of the insurer, in order to avail himself of any provision in this policy rendering it void, to promptly cancel the policy as provided herein upon having or obtaining notice or knowledge of the existence of any facts or circumstances which would, according to the terms of the policy, render it void; otherwise it will be deemed to have waived such provision or provisions voiding the policy. Provided, that if the grounds for cancellation under the last clause shall be distinctly specified in the written notice, such cancellation may be effected upon twenty-four hours' notice to the insured; and actual notice to, or the knowledge of, any agent of the company as above mentioned shall be deemed notice to, and knowledge of, the company.

Provisions required by law to be stated in this policy.— It is hereby declared and agreed that the funds and assets of the company shall alone be answerable under this policy, and that no member of the company shall be liable for more than the

unpaid portion of his share or shares in the capital of the company.

In witness whereof, this company has executed and attested these presents.

This policy shall not be valid until countersigned by the duly authorized agent of the company at

.....,

Manager.

Countersigned at, this day of, 190..

.....,

Agent.

SOUTH DAKOTA.

Laws 1905, Chapter 126.

PROVIDING STANDARD FORM OF FIRE INSURANCE POLICY.

§ 1. **Matters which may be added to standard form.**—No fire insurance company shall issue any fire insurance policies on property in this state other than those of the standard form; except as follows, to-wit:

First—A company may print on or in its policies its name, location and date of incorporation, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and if it be issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at"

Second—A company may print or use in its policies printed forms of description and specification of the property insured, including permits for the use of electricity, gasoline or storage of other extra hazardous product or material, also for repairs and improvements, for the operation or ceasing to operate and for the maintenance of sprinkling or other improvements in case of factories or similar risks, also may grant permission for premises to remain vacant.

Third—A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words: "Also any damage by lightning, whether

FORMS OF FIRE INSURANCE CONTRACT, ETC. 520g

fire ensues or not," and in the clause providing for apportionment of loss in case of other insurance, the words, "whether by fire, lightning or both."

Fourth — A company incorporated or formed in this state may print in its policy any provisions which it is authorized or required by the laws of this state to insert therein.

Fifth — The blanks in said standard form may be filled in print or in writing.

Sixth — Printed or written forms of description and specification or schedules of the property covered by any particular policy and any other matters necessary to clearly express all the facts and conditions of insurance of any particular risk (which fact or conditions shall in no case be inconsistent with, or a waiver of, any of the provisions or conditions of the standard policy herein provided for), may be written or attached or appended to any policy issued on property in the state.

Seventh — Where two or more companies (each having previously complied with the laws of this state) unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract, also the proportion of the premium to be paid each company, the proportion of liability each company agrees to assume, and in the printed conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to companies issuing such policy.

Eighth — A clause may be inserted in or attached to the policy making the loss, if any, payable to a mortgagee or trustee as his interest may appear.

§ 2. **Standard form of policy.**— The said standard form of fire insurance policy hereby adopted and prescribed for the State of South Dakota shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to-wit:

(Here follows the form as above printed.)

TABLE STATUTES PRESCRIBING STANDARD
FORMS.

- Connecticut* — L. 1893, chap. 226, §§ 7-9, in effect January 1, 1894; General Statutes, 1902, § 3497.
- Louisiana* — L. 1898, No. 105, § 22.
- Maine* — L. 1895, chap. 18, § 1; L. 1905, chap. .
- Massachusetts* — L. 1873, chap. 331, first authorized but did not prohibit other forms; repealed L. 1881, chap. 166, and form prescribed; 2 R. L. 1902, chap. 118, § 60.
- Michigan** — L. 1881, chap. 149; L. 1889, chap. 195; 2 Comp. L. 1897, § 5171.
- Minnesota* — L. 1889, chap. 217, in effect January 1, 1890; repealed L. 1895, chap. 175, § 53, and form prescribed; L. 1897, chap. 354.
- Missouri* — L. 1895, p. 194; 2 R. S. 1899, § 7979.
- New Hampshire* — L. 1885, chap. 93, § 3; Pub. St. 1901, chap. 170.
- New Jersey* — L. 1892, p. 366, effect January 1, 1893; L. 1902, chap. 134, § 77.
- New York* — L. 1886, chap. 488, in effect May 1, 1887; Insurance Law 1892, chap. 690, § 121.
- North Carolina* — L. 1893, chap. 299; Public L. 1899, chap. 54, § 43.
- North Dakota* — L. 1890, chap. 74, § 4, effect October 1, 1890; Rev. Codes 1899, § 4608.
- Pennsylvania* — L. 1891, p. 22; Pepper & L. Dig. 2345, § 95.
- Rhode Island* — L. 1895, chap. 1379, § 1; Gen. L. 1896, chap. 183, § 4.
- South Dakota* — L. 1893, chap. 105, § 1, effect October 1, 1893; 2 Annot. St. 1901, § 4025; repealed L. 1905, chap. , and new form prescribed.
- Wisconsin* — L. 1891, chap. 195; repealed L. 1895, chap. 387, and form prescribed; 1 Sandborn & B. Stat. 1898, §§ 1941, 1942; L. 1899, chap. 316.

* Michigan statute declared unconstitutional. *King v. Concordia Ins. Co.*, Mich. , 103 N. W. Rep. 616. It is understood that the Legislature of 1905 immediately passed an act curing the defect and prescribing the form of policy now in use. And see this volume, note on page 2, and "Construction," Rule 1, page 450.

TITLE II.

Statutory Provisions.

Alabama,	Nebraska,
Arizona,	Nevada,
Arkansas,	New Hampshire,
California,	New Jersey,
Colorado,	New York,
Connecticut,	North Carolina,
Delaware,	North Dakota,
Florida,	Ohio,
Georgia,	Oklahoma,
Idaho,	Oregon,
Indiana,	Pennsylvania,
Iowa,	Rhode Island,
Kansas,	South Carolina,
Kentucky,	South Dakota,
Louisiana,	Tennessee,
Maine,	Texas,
Massachusetts,	Vermont,
Michigan,	Virginia,
Minnesota,	Washington,
Mississippi,	West Virginia,
Missouri,	Wisconsin.
Montana,	

(The following statutory provisions are inserted as relevant or affecting the subject-matter of the previous chapters of this volume, or mainly as affecting the claim of the insured in the event of a fire.)

ALABAMA.

Civil Code, 1896, Volume 1.

§ 2602. **Contracts of insurance to be in plain language free from ambiguity.**—No life, nor any other insurance company, nor any agent, thereof, shall make any contract of insurance nor agreement as to policy contract, other than is plainly expressed in the policy issued thereon. * * *

§ 2603. **Who are agents of foreign companies; penalty for acting without license.**—Any person who solicits insurance on behalf of any insurance company not organized under or incorporated by the laws of this state, * * * or examines or ad-

justs, or aids in adjusting any loss or on behalf of any such insurance company, whether any such acts shall be done at the request or instance or by the employment of such insurance company, or of or by any other person, shall be held guilty of a misdemeanor, and upon conviction by a court having jurisdiction, shall be fined not less than one hundred dollars nor more than five hundred dollars or may be imprisoned in the county jail not more than thirty days, or both, at the discretion of the court.

§ 2619. **Contract of insurance made by company belonging to tariff association construed to add twenty-five per cent to face of policy; loss; arbitration; notice; proof.**— Every contract or policy of insurance hereafter made or issued shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent. of the amount of such actual loss,* any provision or stipulation in such contract or policy to the contrary notwithstanding: *Provided*, at the time of making such contract or policy of insurance, or subsequently before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; *And provided further*, no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or make proofs of loss or damage shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage.

§ 2620. **Jury finding certain facts must add amount of penalty to verdict, etc.**— If it is shown to the reasonable satisfaction of the jury by a preponderance of the weight of the testimony that such insurer at the time of the making of such agreement or policy of insurance or subsequently before the time of trial belonged to, or was a member of, or in any way connected with any tariff association or such like thing by whatever name called, either in or out of this state, or had made any agreement or had any understanding either in or out of this state with any other person, corporation or association engaged in the business of insurance as agent or otherwise about

* It is doubtful whether this penalty is constitutional and valid. See "Payment of the Loss." Rule 14, note.

any particular rate of premium which should be charged or fixed for any risk of insurance on any person or property or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add twenty-five per cent. of the amount of such actual loss, and judgment shall be rendered accordingly.

ARIZONA.

§ 1. **Duty to furnish blank proofs of loss.**— It shall be the duty of every insurance company doing business in this Territory to furnish blank forms of proofs of loss (when proof of loss is required by such companies to be furnished to them as a condition precedent to the payment of any loss) to every person in the Territory who may claim to have sustained a loss under any policy of insurance issued to him by any of such insurance companies, upon the application of such person to such company at its general office or to the agent of such company at the place where said insurance policy shall have been issued or delivered in the Territory.

§ 2. **Waiver penalty.**— Any insurance company that shall fail or refuse to furnish the blank form of proof of loss to any person applying therefor as provided in the preceding section within twenty days after such application, the furnishing of such proof of loss by such person to the company under whose policy he claims his or her loss, shall be deemed to have been waived by said insurance company and such person sustaining such loss may maintain his or her action against such insurance company to recover the loss sustained by him or her without the necessity of first furnishing proof of loss notwithstanding any provision in the policy of insurance to the contrary under which he or she claims loss.

A failure of the insured to make application for the blanks as above provided shall not be deemed a waiver of any of his rights against the insurer. [Laws of 1903, approved March 19, 1903.]

ARKANSAS.

Sandels & Hill's Digest, 1894.

§ 4140. **Policy; liquidated demand for its face or amount on which premiums are paid.**— A fire insurance policy in case of a total loss by fire of the property insured, shall be held and considered a liquidated demand against the company taking such risk, for the full amount stated in such policy, on (or) the full

amount upon which the company charges, collects or receives a premium; *provided*, the provisions of this article shall not apply to personal property. [As amd. by Laws of 1899, Act LXI.]

§ 4141. **Sureties on bonds may be made defendants; judgments, how rendered and enforced.**—In all actions against any fire, accident or life insurance company, individual or corporation for any claim accruing, or arising upon, or growing out of any policy issued by any such company, individual or corporation, the sureties on the bond required by this act and executed by any such company, individual or corporation, may be made parties defendant and final judgment rendered against them at the same time and in like manner as against the company, individual or corporation issuing the policy, and such judgment shall be enforced as judgments at law are now enforced.

§ 4142. **Service on insurance companies; action for loss.**—When any loss shall occur by fire, lightning or tornado, in the burning, damage or destruction of property upon which there is a policy of insurance, * * * the assured or his assigns in case of fire insurance, may maintain an action against the insurance company taking the risk, in the county where the loss occurs. * * * [As amd. by Laws of 1897, Act XXIV.]

§ 4144. **New actions after reversal or non-suits, when; provisions of policy not binding.**—In all actions against insurance companies upon policies of insurance issued by them, if the plaintiff shall suffer a non-suit, or if after a verdict for him the judgment shall be arrested, or if after judgment for him the same shall be reversed on appeal or writ of error, such plaintiff may commence a new action from time to time within one year after non-suit suffered or judgment arrested or reversed; and no stipulation contained in any policy of insurance shall avail to deprive the plaintiff in such action of any of the benefits of this section, but the same shall apply to the limitation of the time of suing stipulated for in the policy of insurance.

Laws of 1899, Act LXXXV.

§ 1. **Substantial compliance with terms of policy sufficient to entitle party to recover in all suits.**—That in all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to

whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action.

Laws of 1901, Act XLVI.

§ 1. **Time fixed for bringing actions, same as on promises in writing.**—That hereafter an action may be maintained in all of the courts of this State to recover on any claim or loss arising on a policy of insurance on property or life against the company issuing any such policy, or the sureties on the bond required by the laws of this State as a condition precedent to its right to do business in this State, at any time within the period prescribed by law for bringing actions on promises in writing; and any stipulation or provision in any such policy of insurance requiring such action to be brought within any shorter time or be barred shall be, and the same is hereby declared to be void.

CALIFORNIA.

Pomeroy's Civil Code.

§ 2541. **Assignment to mortgagee of thing insured.**—Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee,* but any act which, under the contract of insurance, is to be performed by the mortgagor, may be performed by the mortgagee, with the same effect as if it had been performed by the mortgagor. [Commissioners' amendment approved March 16, 1901; took effect July 1, 1901.]

§ 2542. **New contract between insurer and assignee.**—If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and at the time of his assent imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

§ 2596. **Valued policy, what.**—A valued policy is one which expresses on its face an agreement that the thing insured shall be valued as a specified sum.

*Beginning with this word to end constituted the amendment of 1901, but same has been declared unconstitutional by the Supreme Court of California in *Lewis v. Dunne*, 134 Cal. 291. And see Supplement to Pomeroy's Code. Entire section as above printed enacted by Legislature, L. 1905, ch. .

§ 2620. **Overinsurance by several insurers.**— In case of an overinsurance by several insurers the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

§ 2621. **Contribution.**— When an overinsurance is effected by simultaneous policies, the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies.

§ 2622. **Proportionate contribution.**— When an overinsurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

§ 2626. **Perils, remote and proximate.**— An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

§ 2627. **Loss incurred in rescue from peril.**— An insurer is liable where the thing insured is rescued from a peril insured against that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

§ 2628. **Excepted perils.**— Where a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.

§ 2629. **Exoneration of insurer.**— An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents, or others.

§ 2633. **Notice of loss.**— In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by some person insured or entitled to the benefit of the insurance, without unnecessary delay. [Amendment approved April 30, 1874; amendments 1873–74, p. 256; took effect July 1, 1874.]

§ 2634. **Preliminary proofs.**— When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it

is sufficient for him to give the best evidence which he has in his power at the time.

§ 2635. **Waiver of defects in notice, etc.**—All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

§ 2636. **Waiver of delay.**—Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

§ 2637. **Certificate, when dispensed with.**—If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

§ 2642. **Contribution in case of double insurance.**—In case of double insurance, the several insurers are liable to pay losses thereon as follows:

1. In fire insurance, each insurer may contribute ratably toward the loss, without regard to the dates of the several policies. * * * [Amendment approved March 30, 1874; amendments, 1873–74, p. 257; took effect, July 1, 1874.]

§ 2755. **Acts of the insured.**—A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

§ 2756. **Measure of indemnity.**—If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured in the condition in which it was at the time of the injury; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.

§ 2757. **Examination of building by insured to determine and fix its value; contribution.**—Whenever the insured desires to have a valuation named in his policy, insuring any building or structure against fire, he may require such building or structure to be examined by the insurer and the value of the insured's interest therein shall be thereupon fixed by the parties. The cost of such examination shall be paid for by the insured. A clause shall be inserted in such policy stating substantially that the

value of the insured's interest in such building or structure has been thus fixed. In the absence of any change increasing the risk without the consent of the insurer or of fraud on the part of the insured, then in case of a total loss under such policy, the whole amount so insured upon the insured's interest in such building or structure, as stated in the policy upon which the insurers have received a premium, shall be paid, and in case of a partial loss the full amount of the partial loss shall be so paid, and in case there are two or more policies covering the insured's interest therein, each policy shall contribute pro rata to the payment of such whole or partial loss. But in no case shall the insurer be required to pay more than the amount stated in such policy. This section shall not prevent the parties from stipulating in such policies concerning the repairing, rebuilding, or replacing buildings or structures wholly or partially damaged or destroyed. [Amendment approved March 23, 1901; Stats. 1901, p. 572; in effect sixty days from passage.]

Laws of 1903, Chapter 181.

§ 1. Section 383 of the Code of Civil Procedure of the State of California is hereby amended to read as follows:

§ 383. Several insurers may be joined in one action.—
* * * Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in the interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.

COLORADO.

An Act to provide a liability against railroad companies for damages caused by fire, and to repeal all acts and parts of acts in conflict therewith.

Be it Enacted by the General Assembly of the State of Colorado:

§ 1. Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part, thereof, in this state, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper action, in any court of competent juris-

diction; Provided, The said action be brought by the party injured within two years next ensuing after it accrues; and Provided further, That the liability herein imposed shall inure solely in favor of the owner or mortgagee of the property so damaged or destroyed by fire; and the same shall not pass by assignment or subrogation to any insurance company that has written a policy thereon; Provided, that nothing in this act shall be held to apply to or in any manner affect any right which has accrued prior to the passage hereof or any cause or suit now pending.

§ 2. All acts and parts of acts in conflict with this act are hereby repealed. [Laws of 1903, chap. 153.]

CONNECTICUT.

General Statutes, 1902.

§ 3497. **Form of policy.**— No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form filed in the office of the secretary of the state, known and designated as the standard fire insurance policy of the state of Connecticut, except as follows:

It may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and, if it be issued through an agent, the words, "this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at _____," and after the words "standard fire insurance policy of the state of Connecticut," on the back of the form, the names of such other states as have adopted this standard form.

It may use in its policies written or printed forms of description and specification of the property insured.

When insuring against damage by lightning it may print, in the clause enumerating the perils insured against, the additional words, "also any damage by lightning whether fire ensues or not," and, in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning, or both."

It may write or print upon the margin or across the face of a policy, or write or print in type not smaller than long primer upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all slips, riders, and provisions must be signed by the officers or agent of the company so using them.

§ 3499. **Standard fire insurance policy; form.**— The standard form of policy shall be plainly printed and no portion thereof shall be in type smaller than the type used in printing the said form on file in the office of the secretary of state, and shall be as follows, to wit: [See form under prior title of this chapter, page 474.]

The provisions of this chapter shall not limit insurance companies to the use of any particular size of paper or manner of folding the paper upon which their policies may be issued.

Every insurance company which shall cause to be issued, and every agent who shall make, issue, or deliver, a policy of fire insurance other than the standard form of fire insurance policy shall forfeit for each offense not more than two hundred dollars; but such policy shall nevertheless be binding upon the company issuing the same.

§ 3512. **Mortgagee to cause proofs of loss to be made.**— In case of loss by fire upon any mortgaged real property upon which there is insurance made by the policy payable in case of loss to the mortgagee, if the party who obtained the insurance or in whose name it was obtained shall fail for three months after the fire to file proper and sufficient proofs of loss, the mortgagee may, within thirty days thereafter, present to a judge of the superior court a petition setting forth the foregoing facts and praying that a disinterested person be appointed to make such proofs, and for other relief.

§ 3513. **Mortgagor may be summoned to appear.**— Any justice of the peace or clerk or commissioner of the superior court may, upon application of such mortgagee, issue a summons returnable before such judge, not less than six days after service thereof, directed to such mortgagor, and also to such insurance company, requiring them to appear before such judge at such time and place as shall be therein named to show cause why the prayer of such petition should not be granted.

§ 3514. **Proofs of loss, how made and filed.**— After hearing such parties as may appear and desire to be heard, such judge may appoint some fit and disinterested person to make inquiry as to the matters required to be set forth and done and to prepare and file with the company issuing such policy such proofs of loss, and to do such other acts as the conditions of the policy may require to be done by the mortgagor.

§ 3515. **Liability of company.**— If such proofs of loss and the other acts to be done by such appointee shall, in other respects, conform to the requirements of the policy, the company issuing such policy shall be liable in the same manner and to

the same amount as if such proofs had been made and such other acts had been done by the party insured, or in whose name the policy was obtained, during the time specified in the policy.

§ 3516. **Division of amount recovered where parties fail to agree.**—If question shall arise between the parties, or any two or more of them, as to the amount and proportion of the sum due under such policy which should be paid to the different parties who may be or claim to be entitled thereunder, such judge may, upon such notice as he may direct to be given to the parties, after hearing such parties as may desire to be heard, adjudicate and determine between the parties as upon a bill of interpleader; and if any party shall not be found, or shall decline to receive the amount of the judgment in his favor, the company may pay such amount into the court to be deposited and kept under the direction of the court, and the receipt of the clerk shall be sufficient discharge and satisfaction of such judgment as to such amount.

§ 3517. **Taxation of costs.**— Upon the termination of any hearing, or upon final judgment, the judge may tax costs, including reasonable counsel fees, in favor of such mortgagee and also in favor of such insurance company, against such mortgagor, if in his judgment the proceedings have been rendered necessary by the fault or neglect of the mortgagor, and such costs in his favor may be added by the mortgagee to the amount due him; and such costs in favor of the insurance company may be deducted from the amount due under its policy.

§ 3605. **Suits not to be restrained to period less than one year.**— No insurance company shall limit the term within which any suit shall be brought against it to a period less than one year from the time when the loss insured against shall occur.

DELAWARE.

Revised Code, 1893.

(Laws of 1889 [Vol. 18], chap. 695, as amd. by Laws of 1893 [Vol. 19], chap. 696, p. 586.)

§ 1. **Liability of insurance companies upon policies; policy to have indorsed upon its face a contract; company may adjust loss by replacing property.**— Whenever any policy of insurance shall be issued to insure any real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed without criminal fault on the part of the insured, or his assigns, the amount of the insurance stated

in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages, subject to the proviso herein; and every such policy, whether hereafter issued or renewed, shall have endorsed across the face of it the following: "It is agreed between insurer and insured that the value of the insured property is of the sum of \$ _____; and this estimate shall be binding on both parties as to value; *provided, however,* that nothing herein contained shall, in case of loss, prevent the company insuring from adjusting the loss by replacing the property destroyed." And in case any owner shall effect any subsequent insurance upon any larger value than so agreed, all insurance as well as that then existing as that subsequently obtained shall become void. * * *

§ 3. **Penalty.**—The court upon rendering judgment against any insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs.

FLORIDA.*

Chapter 4677.

An Act to Regulate Contracts of Insurance of Buildings and Structures in this State, to Fix a Measure of Damage in Case of Loss, and to Prescribe a Rule of Evidence Therein.

§ 1. That from and after the passage of this act any individual, firm, corporation or association insuring any building or structure in this State against loss or damage by fire or lightning, shall cause such building or structure to be examined by an agent of the insurer and full description thereof to be made, and the insurable value thereof to be fixed by such agent and written in the policy; in the absence of any change increasing the risk without the consent of the insurers, in case of total loss the whole amount mentioned in the policy upon which the insurers receive a premium shall be paid, and in case of partial loss the full amount of the partial loss shall be paid, but in no case shall the insurer be required to pay more than the amount upon which a premium is paid.

§ 2. In case of the total loss of the property insured the measure of damage shall be the amount upon which the insured paid a premium, and, in case of partial loss, the measure of damage shall be such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building or structure as fixed by the agent of the insurer, and the insurers shall be estopped from denying that the prop-

* By L. 1905, ch. —, in event of total loss to personal property the company is required to return unearned premium for excess of insurance over appraised or agreed loss.

erty insured was worth at the time of insuring the amount of the insurable value as fixed by the agent.

§ 4. That the defendant in any action brought upon a policy, or contract of insurance, hereafter made, or renewed, insuring any building or structure in this State, against loss or damage by fire or lightning, shall not be permitted to defend against such action, by setting up any claim, or provision of such policy, or contract of insurance, as avoiding the provisions, or any of them, of this act; and it shall be the duty of the court on motion of the plaintiff, or on its own motion, to strike out any plea setting up such defense. [Approved May 31, 1899.]

GEORGIA.

Code, 1895, Volume 2.

§ 2094. **Loss, what is.**—A loss or injury may occur from fire without the actual burning of the articles or property, as a house blown up to stop a conflagration, of goods removed in imminent danger, or damage by water used to extinguish the flames.

§ 2096. **Diligence by assured.**—The assured is bound to ordinary diligence in protecting the property from fire, and gross negligence on his part will relieve the insurer. Simple negligence by a servant, or the assured, unaffected by fraud or design in the latter, will not relieve the insurer.

§ 2105. **Transfer after loss.**—After the loss occurs, a sale of the property and transfer of the policy does not affect the liability of the insurer, but the assignee may recover.

§ 2106. **Or by operation of law.**—A transfer of the property or policy by operation of law, or under the order of the court, will confer on the assignee all the rights of the assured.

§ 2108. **Prescribing regulations; loss; notice; proof.**—Every insurer has a right to prescribe regulations as to notice and preliminary proof of loss, which must be substantially complied with by the assured: *Provided*, the same are made known at the time of the insurance, and are not materially changed during the existence of the contract. An absolute refusal to pay waives a compliance with these preliminaries.

§ 2109. **Amount of recovery; contribution.**—The assured may recover the full amount of his loss: *Provided*, the same is within the amount insured. If he has several policies on the same property, the recovery from each company will be *pro rata* as to the amount insured.

§ 2110. **Companies to pay full amount of loss.**— All insurance companies issuing policies on property in this State shall pay to their policy-holders the full amount of loss sustained upon the property insured by them; *provided*, said amount of loss does not exceed the amount of insurance expressed in the policy, and that all stipulations in such policies to the contrary shall be null and void; *provided*, that in cases of losses on stocks of goods and merchandise and other species of personal property changing in specifics and quantity by the usual custom of trade only the actual value of the property at the time of loss may be recovered; *provided*, the loss does not exceed the amount expressed in the policy.

§ 2111. **Estimation of value.**— The value of property is to be estimated at the time of the loss. Contingent profits are not a part of such value.

§ 2112. **Privilege of rebuilding.**— The privilege of rebuilding or reinstating the property must be reserved in the policy, or it does not exist. In such cases the assured has no claim for rents, if done within a reasonable time, nor the insurer for increased value from the fact of new and more valuable materials.

§ 2113. **Recovery back by insurer.**— If, after payment of loss, the insurer discovers evidence to show himself not liable on the policy, he may recover back the money in an action for money had and received.

§ 2140. **Insurance companies shall pay damages, when.**— The several insurance companies of this State, and foreign insurance companies doing business in this State, in all cases when a loss occurs, and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to the holder of said policy, in addition to the loss, not more than twenty-five per cent.* on the liability of said company for said loss; also, all reasonable attorney's fees for the prosecution of the case against said company; *Provided*, it shall be made to appear to the jury trying the same, that the refusal of the company to pay said loss was in bad faith.

Laws of 1887, as amended by Laws of 1890.

§ 9. **Who are agents.**— Any person who solicits in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other State, * * * or who shall examine into or adjust or aid in adjusting any loss for or in be-

* See note to Alabama statute, p. 522.

half of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken.

Agents; penalty for acting without authority.— Any person who shall do or perform any of the acts or things mentioned for any insurance company or agent of said company without such company having first received a certificate of authority from the Insurance Commissioner of this State, as required by law, shall be guilty of a misdemeanor, and on conviction in any court of competent jurisdiction, shall be punished as provided by section 4310 of the Code of Georgia, and shall also pay a sum equal to the State, county and municipal taxes and licenses required to be paid by insurance companies legally doing business in this State; and it is hereby made the duty of the Insurance Commissioner to see that all violators of the provisions of this section are prosecuted.

Proviso as to adjusters.— “Any person who shall do any of the acts mentioned in this section shall also be personally liable to the holder of any policy of insurance, in respect of which such act was done, for any loss covered by the same; *provided*, that the penalties provided for in this section shall not apply to adjusters or inspectors of unauthorized insurance companies from whom the citizens of this State have purchased insurance for themselves as provided for in this section, whenever the person or persons purchasing said insurance shall immediately notify the Insurance Commissioner, giving the name and locality of said company in which they have policies, and at the same time pay to said Insurance Commissioner the same licenses, fees and taxes for each company as are now or may hereafter be required of fire insurance companies authorized to do business by the laws of this State; and when the license fees for any company have been paid in any one year by any person or persons who have purchased insurance from said company, then, in that case, any person or persons purchasing insurance from said company thereafter shall not be liable for the license fees of said company during the said year, but only for such taxes on premiums as may be required from time to time of insurance companies authorized to do business in this State; *provided, further*, that it shall not be lawful for said inspectors to solicit business for their companies.” [As amd. by L. 1890.]

IDAHO.**Laws of 1901, Bill No. 115, Chapter 2.**

§ 11. In the event of the total destruction of any insured property on which the amount or agreed loss shall be less than the total amount insured thereon, the insuring company or companies shall return to the insured, the unearned insurance premium for the excess of the insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid.

INDIANA.**Horner's Statutes, 1901, Volume 1.**

§ 3770. **Conditions forbidden.**— 6. No such* insurance company shall insert any condition, in any policy hereafter issued, requiring the insured to give notice forthwith, or within the period of time less than five days, of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest justice of the peace, mayor, judge, clergyman, or other official, or person, of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy, inserted to avoid the provisions of this section, shall be void, and no condition or agreement not to sue for a period of less than three years, shall be valid.

Burns' Statutes, 1901, Volume 2.

§ 4859a. **Conditions in insurance policies.**— It shall be unlawful for any fire insurance company doing business in this state to issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire or lightning to the property described in such policy, and any such clause or provision shall be null and void and of no effect, except that it may be lawful for such companies to issue, and it may be optional with the assured to accept a policy or contract of insurance containing a co-insurance clause or provision when a reduction in the

* Foreign companies.

rate for insurance on the property described in such policy is the consideration named, and when so accepted the co-insurance clause or provision shall be binding on the assured and the company. *Provided*, That the provisions of this act shall not apply to railroad or marine insurance.

IOWA.

Code, 1897.

§ 1742. **Evidence of value; proofs; action.**— In any action brought in any court in this state on any policy of insurance for the loss of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy; *provided*, the insurance company or association issuing such policy may show the actual value of said property at date of policy, and any depreciation in the value thereof before the loss occurred; but the said insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy. And in an action on such policy it shall only be necessary for the assured to prove the loss of the building insured, and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of his loss.

§ 1742a. **Proofs of loss.**— In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within sixty days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding. [Laws of 1902, chap. 73, § 1.]

§ 1743. **Conditions.**— Any condition or stipulation in an application, policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: *provided*, however, that any condition or stipulation referring to any other insurance, valid or invalid, or to vacancy of the insured premises or the title or ownership of the property insured, or to liens or incumbrances thereon created by volun-

tary act of the insured and within his control, or to the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or to the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or to the removal of the property insured, or to a change in the occupancy or use of the property insured, if such removal, change or use makes the risk more hazardous, or to the fraud of the insured in the procurement of the contract of insurance, shall not be changed or affected by this provision. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisal stipulation as to fixing value of property. No arbitration shall take place except where the property was situated at the time of loss. Any agreement, stipulation or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss, or where the amount of loss, upon the request of the insurance company, has been submitted to arbitration. Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. The provisions of this section shall apply to all contracts of insurance on real and personal property. [Laws of 1900, chaps. 63, 64.]

§ 1744. **Notice and proof of loss; time of bringing action; provisions not affected by contract.**—The notice of loss and proof thereof required in section seventeen hundred and forty-two hereof, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or contract to the contrary shall affect the provisions of this and the three preceding sections. [Laws of 1898, chap. 44.]

§ 1745. **Other insurance; prorating.**—Any provision, contract or stipulation contained in any policy of insurance, issued by any insurance company doing business in the state under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer

of the property insured in such policy, or shall bear any portion of the loss on the property insured, shall be void; and the auditor of state shall refuse to authorize any such company to do business or to renew the authority or the certificate of any such company when the form of policy issued or proposed to be issued contains any such provision, contract or stipulation. No condition or stipulation in a policy of insurance fixing the amount of liability or recovery under such policy with reference to prorating with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding.

KANSAS.

General Statutes, 1901.

§ 3407. **Evidence of value.**— Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages, and the payment of money as a premium for insurance shall be *prima facie* evidence that the party paying such insurance is the owner of the property insured: *Provided*, That any insurance company may set up fraud in obtaining a policy as a defense to a suit thereon.

§ 3408. **Examine premises; erroneous description.**— It shall be the duty of every person, corporation, association, partnership, company or individual issuing any policy insuring real property of any description against loss by fire or any of the risks usually insured against in their insurance policies, by itself or its agents, to make careful examination of the premises insured and to place in such policy a full, complete and correct description of the property or premises insured thereby; and no failure to properly and fully describe such property or premises, nor any erroneous statement in the description of such property or premises, shall be a defense in any action to collect for loss thereon or thereunder when such description shall be sufficient to enable a person of ordinary intelligence to find and fully identify the property or premises upon which said insurance was written and upon which premiums have been paid, and this notwithstanding any provisions in said insurance policy contained.

KENTUCKY.**Kentucky Statutes, 1899.**

§ 700. **Liability of company for value of property as fixed in policy.**— That insurance companies that take fire or storm risks on real property in this Commonwealth shall, on all policies issued after this act takes effect (in case of total loss thereof by fire or storm), be liable for the full estimated value of the property insured, as the value thereof is fixed in the face of the policy; and in cases of partial loss of the property insured, the liability of the company shall not exceed the actual loss of the party insured; *Provided*, That the estimated value of the property insured may be diminished to the extent of any depreciation in the value of the property occurring between the dates of the policy and the loss; *And provided further*, That the insured shall be liable for any fraud he may practice in fixing the value of the property, if the company be misled thereby.

LOUISIANA.**Revised Laws, 1897, Page 467.***

(Laws of 1894, page 187.)

§ 1. **Valued policy.**— That in all contracts of fire insurance which may hereafter be entered into and which are intended to take effect on property immovable by nature or destination situated within this State, the insurer shall pay to the insured in case of total loss the total amount for which the property is insured in the policy or policies, provided the insurance is not in excess of the value of the property, or does not exceed three-fourths the value of the property where the three-quarter clause has been made a part of the contract.

§ 2. **Partial loss.**— That in the event of damage or partial loss the insurer shall pay to the insured the face value of the policy or policies not however in excess of the actual amount of damages sustained or in excess of three-fourths the value of the property where the three-quarter clause has been made a part of the contract.

Refunding of certain premiums.— That fire insurance companies doing business in the State shall refund to the insured all premiums collected on the difference between the values of the real property fixed in the policy of insurance and agreed to be paid and the amount of the judgment rendered against said company in case of total loss by fire together with legal interest on such premiums from date of their payment. [R. L. 1897. p. 465; L. 1888, p. 209.]

* Now 1 R. L. 1904, p. 888.

Laws of Louisiana, 1898.*

(Act No. 105, Article III.)

§ 15. **Return of premium.**— Upon the adjustment and settlement of a loss under a policy of fire insurance, the insured shall be entitled to recover, in addition to the sum of the loss as agreed upon, the return of the premium paid under the said specific policy on the excess between the sum of the amount insured, and the sum of the amount ascertained to be due with legal interest from the date of the payment of the premiums.

(Act No. 105, p. 132.)

§ 22 (p. 151). **Standard form of fire insurance policy.**— * * * No fire insurance company shall issue fire insurance policies on property in this State other than those which shall conform to the requirements of the New York Standard Form of Fire Insurance Policy.

(Act No. 183, p. 429.)

An Act to regulate the enforcement of the three-quarter country clause in fire insurance policies in force in this State.

§ 1. **Unlawful to require assured to contribute any portion of cost of rebuilding in enforcement of three-fourths country clause.**— * * * That in the enforcement of the three-quarter country clause of any fire insurance policy for any loss thereunder in this State, that in all cases where the insurer elects to replace movable property in kind or to rebuild or repair immovable property, rather than to pay the loss in money, it shall not be lawful to require the assured to contribute any portion of the cost of such replacing, rebuilding or repairing.

Laws of Louisiana, 1900.

(Act No. 135, p. 209.)

An Act to fix the value of immovables by nature insured against loss or damage by fire, in case of loss or damage by fire.

§ 1. **Fixing the value of immovables by nature insured against loss or damage by fire.**— * * * That whenever any policy of insurance against loss by fire is hereafter written or renewed, on property immovable by nature and situate in this State, and the said property shall be either partially damaged or totally destroyed, without criminal fault on the part of the

* The laws on this page of 1898 and 1900 will be found 1 R. L. 1904, pages 861, 864, 889, 890.

insured or his assigns, the value of the property as assessed by the insurer or as by him permitted to be assessed at the time of the issuance of the policy, shall be conclusively taken to be the true value of the property at the time of the issuance of the policy and the true value of the property at the time of the damage or destruction. Provided, that nothing herein shall be so construed as to prevent the insurer previous to the damage or destruction of property from reducing the insurance thereon.

§ 2. **Duty of the insurer to pay the insured total loss or to replace the property destroyed.**— That whenever any policy of insurance against loss by fire is hereafter written or renewed on property situate in this State, and the said property shall be totally destroyed without criminal fault upon the part of the insured, or his assigns, the full amount of the insurance on the property so destroyed shall be paid by the insurer, and that when the said property shall be partially damaged, without criminal fault on the part of the insured or his assigns, the insurer shall pay to the insured such amount as will permit the insured to restore the damaged property to its original condition. Provided that nothing herein shall be so construed as to prevent the insurer from replacing property partially damaged or totally destroyed at his own expense and without contribution on the part of the insured.

MAINE.

Revised Statutes, 1883 (now 1903).

(Chapter 49.)

§ 21.* **Insured shall give notice of loss, and render a particular account thereof, under oath, to company, and if required shall exhibit his books and vouchers and be examined on oath.**— In case of loss under a policy against fire, the insured shall notify the company or its agent thereof, and within a reasonable time afterwards, shall deliver to the same, as particular an account of the loss and damage as the nature of the case will admit, stating therein his interest in the property, what other insurance, if any, existed thereon, in what manner the building insured, or containing the property insured, was occupied, at the time of the fire, and by whom, and when and how the fire occurred, so far as he knows or believes; to be sworn to before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to and does believe such statement to be true; the insured shall, if so requested, within ten days after notice of loss, exhibit to the

* This section is omitted from R. S. 1903, and is superseded by L. 1895. See page 544. See also Repealing Act, R. S. 1903.

agent of the company his books of account, bills of parcels and any other vouchers in his possession, and shall, if requested, submit to an examination under oath, in the place of his residence; no other preliminary proof of any kind shall be required before commencing an action against such company. All provisions contained in any policy of insurance, in conflict with any of the provisions hereof, are null and void, and all contracts of insurance made, renewed or extended in the state, or on property within the state, are subject to the provisions hereof.

§ 52.* **Lien of mortgagee upon policy.**—The mortgagee of any real estate shall have a lien upon any policy of insurance against loss by fire procured thereon by the mortgagor, to take effect from the time he files with the secretary of the company a written notice briefly describing his mortgage, the estate conveyed thereby, and the sum remaining unpaid thereon. If the mortgagor, by a writing by him signed, and filed with the secretary, consents that the whole of the sum secured by the policy, or so much as is required to discharge the amount due on the mortgage at the time when a loss occurs, shall be applied to the payment of the mortgage, it shall be so paid by the company, and the mortgagee's receipt therefor shall be a sufficient discharge of the company.

§ 53. **How enforced if mortgagor does not consent.**—If the mortgagor does not so consent, the mortgagee may, at any time within sixty days after a loss, enforce his lien by a suit against the mortgagor, and the company as his trustee, in which judgment may be rendered for what is found due from said company upon the policy, notwithstanding the time of payment of the whole sum secured by the mortgage has not arrived.

§ 54. **How amount recovered in suit is to be applied.**—The amount so recovered shall be applied first to the payment of the costs of the suit and officer's fees on the execution, and next to the payment of the amount due on the mortgage; and the balance, if any, shall be retained by the company and paid to the mortgagor. If the company assumes the defence, it shall be liable to the plaintiff for costs in the same manner as the principal defendant, defending the suit, would be.

§ 55. **Priority of mortgagees, how determined.**—When two or more mortgagees claim the benefit of the three preceding sections, their rights shall be determined according to the priority of their claims and mortgages by the principles of law.

§ 56. **Claims of mortgagee, when to be void.**—When any mortgagee claims the benefit of said sections, any policy of insurance, which he had procured or subsequently procures on

* These sections are now numbered 54–58 R. S. 1903, but read the same.

his interest in the same property by virtue of his mortgage, is void, unless consented to by the company insuring the mortgagor's interest.

Revised Statutes, Chapter 52.

§ 73. **Fires caused by locomotive engines.**—When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had.

Laws of 1895, Chapter 18.

An Act additional to chapter forty-nine of the Revised Statutes, relating to Insurance.

§ 1. **Only policies of standard form may be issued.**—No fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form herein set forth, except as follows:*

I. A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and, if it be issued through an agent, the words, "this policy shall not be valid until countersigned by the duly authorized agent of the company at"

II. A company may print or use in its policies, printed forms of description and specification of the property insured.

III. A company insuring against damage by lightning may print, in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and, in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning or both."

IV. A company incorporated or formed in this state may print in its policies, any provisions which it is authorized or

* Declared constitutional, 97 Me. 530, 55 Atl. Rep. 828, opinion on request of Legislature. This section is now numbered 4, including the form in R. S. 1903, ch. 49.

required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement or by the laws of its own state or country, not contrary to the laws of this state; provided, that the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such way as to affect the question of loss, to be appended to the policy by a slip or rider as hereinafter provided.

V. The blanks in said standard form may be filled in print or writing.

VI. A company may write upon the margin or across the face of the policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

VII. A company may print upon policies issued in compliance with the preceding provisions of this section, the words, "Maine standard policy." The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows:

(See Form, p. 494.)

Section 5, Revised Statutes, 1903.

Proceedings in case parties fail to agree as to amount of loss.

— In case of loss under any fire insurance policy, issued on property in this state, in the standard form above set forth, and the failure of the parties to agree as to the amount of loss, if the insurance company shall not, within ten days after a written request to appoint referees under the provision for arbitration in such policy, name three men under such provision, each of whom shall be a resident of this state, and willing to act as one of such referees; and if also such insurance company shall not, within ten days after receiving the names of three men named by the insured under such provision, make known to the insured its choice of one of them to act as one of such referees, it shall be deemed to have waived the right to an arbitration under such policy, and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage. And in case of the failure of two referees, chosen, respectively, by the insurance company and the insured, to agree upon and select within ten days from their appointment a third referee willing to act in said capacity, either of

the parties may within twenty days from the expiration of said ten days make written application setting forth the facts to the insurance commissioner to appoint such third referee, and said commissioner shall thereupon make such appointment and shall send written notification thereof to the parties.

MASSACHUSETTS.

Revised Laws, 1902, Volume 2, Chapter 118.

§ 57. **Liability for fire losses limited.**—No insurance company shall knowingly issue any fire insurance policy upon property within this commonwealth for an amount which with any existing insurance thereon exceeds the fair value of the property, nor for a longer term than seven years.

If buildings insured against loss by fire, and situated within this commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage; and if it shall appear that the insured has paid premiums on an amount in excess of said actual value, the assured shall be reimbursed the proportionate excess of premiums paid on the difference between the amount named in the policy and said actual value, with interest at six per cent per annum from the date of issue; and said excess of premiums and interest thereon shall be allowed the insured from the time any company or companies carrying said insurance at the time of the loss have continuously carried the insurance on the destroyed building or buildings, whether under policies existing at the time of the loss or under previous policies in the same company or companies.

§ 58. **Payment to mortgagees protected by policies.**—If by an agreement with the insured or by the terms of a fire insurance policy taken out by a mortgagor the whole or any part of the loss thereon is payable to a mortgagee or mortgagees of the property or for their benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim as their claim shall appear, not beyond the amount for which the company is liable, and such payment shall be to the extent thereof payment and satisfaction of the liability of the company under such policy.

§ 60. **Standard form of fire policy to be used, except.**—No fire insurance company shall issue fire insurance policies on

property in this commonwealth, other than those of the standard form herein set forth, except as follows:

First. Name, location, etc.—A company may print on or in its policies its name, location and date of incorporation, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and, if it is issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at"

Second. Printed forms of description.— A company may print or use in its policies printed forms of description and specification of the property insured.

Third. Lightning clause.— A company insuring against damage by lightning, may print, in the clause enumerating the perils insured against, the additional words "Also any damage by lightning whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance, the words "whether by fire, lightning or both."

Fourth. Sundry provisions.— A company incorporated or formed in this commonwealth may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this commonwealth may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this commonwealth; but the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such way as to affect the question of loss, to be appended to the policy by a slip or rider as hereinafter provided.

Fifth. Blanks filled in print or writing.—The blanks in said standard form may be filled in print or writing.

Sixth. A company may print upon policies issued in compliance with the preceding provisions of this section the words "Massachusetts Standard Policy."

Seventh. Other provisions.— A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

Said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows:

(Here follows the form, see page 497.)

(Balance of section 60.)

Proceedings in case of failure to choose referees, etc.—In case of loss under any fire insurance policy, issued on property in this commonwealth, in the standard form above set forth, and the failure of the parties to agree as to the amount of loss, the insurance company shall, within ten days after a written request to appoint referees under the provision for arbitration in such policy, name three men under such provision, each of whom shall be a resident of this commonwealth, and willing to act as one of such referees, of whom the insured shall, within ten days after receiving said names, make known to the insurance company its choice of one of them to act as one of such referees; and such insurance company shall, within ten days after receiving the names of three men named by the insured, under such provision, make known to the insured its choice of one of them to act as one of such referees. And in case of the failure of two referees, chosen, respectively, by the insurance company and the insured, to agree upon and select within ten days from their appointment a third referee willing to act in said capacity, either of said referees or parties may within twenty days from the expiration of said ten days make written application, setting forth the facts, to the insurance commissioner to appoint such third referee; and said commissioner shall thereupon make such appointment and shall send written notification thereof to the parties. In every case of the appointment by the insurance commissioner of said third referee the insuring company or companies shall withhold from the amount of the award rendered one-half of the compensation and expenses of said referee, and said company or companies shall thereupon pay to said referee the full amount of his compensation and expenses.

MICHIGAN.

Compiled Laws, 1897, Volume 2.

5170. Appointment of insurance policy commission.—That as soon as practicable after this act shall take effect the governor shall appoint some suitable person, who, with the commissioner of insurance and the attorney general, shall constitute

a state board to be known and designated as the insurance policy commission. * * *

5171. Commission to adopt standard form of insurance policy.*—It shall be the duty of the said commission, or, in case they cannot agree, of the majority thereof, to adopt a standard form of fire insurance policy for use in this state, and they shall file in the office of the commissioner of insurance a printed copy of such form of policy, leaving suitable blanks to be filled with names, dates, signatures, amounts, and description of the property insured, together with a certificate under their hands showing that such form is the form of policy adopted by them pursuant to the provisions of this act, and is printed with the size and style of type designated by them to be used therefor. Such form shall be so worded and printed as to secure as far as practicable the accomplishment of the following results, viz.:

First, Fairness and equity between the insurers and the assured;

Second, Brevity and simplicity;

Third, The avoidance of technical words and phrases;

Fourth, The avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer;

Fifth, The use of as large and fair type as is consistent with a convenient size of paper or parchment;

Sixth, The placing of each separate condition in a separate paragraph, and the numbering of the paragraphs.

5172. Commissioner of insurance to fix time when form of policy to be used.—When such form of policy shall have been adopted and a copy thereof certified and filed as aforesaid, the commissioner of insurance shall fix a time when the use thereof shall become obligatory on all companies and persons authorized to do business in this state, and he shall give notice thereof to each of such companies. Such notice may be sent by mail in the usual manner, addressed to such company, its president, or secretary, at the place where its home office or general agency for the United States or for this state, is located, and such notice shall be accompanied with a printed copy of the form of policy adopted, and a copy of the certificate thereof filed as aforesaid, and a copy of this act; Provided, however, That the failure to give such notice shall not be held to excuse the violation of any of the provisions of this act. The commissioner of insurance shall also make and file in his office a certificate under his hand and seal of office, showing that he has fixed such time as aforesaid, and such certificate or a duly certified copy

* Statute held unconstitutional, *King v. Concordia Ins. Co.*, Mich., 108 N. W. Rep. 616. It is understood that the legislature of 1905, immediately passed an act curing the defect and prescribing the form in use.

thereof shall be evidence in all courts and places of the facts herein stated.

5173. Commission may alter or amend form.—That said insurance commission shall, whenever they shall deem it necessary, alter or amend the form so adopted by them, and in such case a printed copy of them as so altered or amended shall be filed and certified, as is provided in section three (5172) of this act, and the commissioner of insurance shall fix a time when its use shall become obligatory, and give notice thereof and certify his doings relative thereto in the same manner and with the same effect as is provided in said section.

5174. How form to be known.—The form of policy as so fixed from time to time shall be known and designated as the Michigan standard policy.

5175. Companies prohibited from using other forms.—After the time so fixed by the commissioner of insurance, as aforesaid, no person or company shall, directly or indirectly, make or issue, or cause to be made or issued, any policy or contract of fire insurance of any property situated in this state containing any other or different terms or conditions than those expressed in said Michigan standard policy, or containing any word or words that will add to, take from, or vary the contract therein expressed, or any such contract or policy that is not printed (except in the parts left blank as aforesaid), or that is printed in smaller or substantially different type than that of said standard policy. Every policy or contract made or issued contrary to the provisions of this act shall be void; Provided, That any company or association not incorporated or formed under the laws of this state, but having authority to do business therein, may print in its policies any provision which it is authorized by the laws of the state or country in which it is organized, or required by its deed of settlement or charter to insert therein, relating to the liability of its corporate assets and the liability of its shareholders for unpaid assessments.

5182. Clause added to standard policy, to contain what.—There shall hereafter be inserted in, or by stamp or rider affixed upon, the standard form of insurance policies used in this state, after the clause which contains the conditions for a breach of which without the consent of the company endorsed thereon the policy is declared void, a proviso in substance as follows: Provided, a loss shall occur on the property insured while such breach of condition continues or such breach of condition is the primary or contributory cause of the loss.

5183. * * * Unlawful to limit or restrict certain liability of insurance companies.—That it shall be unlawful

hereafter for any fire insurance company doing business in the state of Michigan to provide by any insurance policy issued by it, or by any clause therein, or by any separate agreement, contract or otherwise, that the liability of said insurance company to the insured shall be limited or restricted by reason of the failure of the said insured to insure the property covered by said policy for any certain amount or proportion of the actual cash value of such property.

5184. Contracts or agreements contrary to provisions of this act shall be void.—Any provision of any policy, or any contract or agreement contrary to the provisions of this act shall be absolutely void, and any insurance company issuing any policy of insurance containing any such provision shall be liable to the insured under such policy in the same manner and to the same extent as if such provision were not therein contained.

MINNESOTA.

General Laws of 1895, Chapter 175.

§ 25. Void provisions; co-insurance.—No fire or fire and marine insurance company shall make any conditions or stipulations in its insurance contracts concerning the court of jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than two years from the time the loss occurred.

Any provisions, contract or stipulation contained in any contract or policy of insurance issued or made by any fire insurance company, association, syndicate or corporation, insuring any property within this state, whereby it is provided or stipulated that the assured shall take out and maintain a larger amount of insurance upon the property than the amount expressed in such policy, or that the insured shall be an insurer of the property insured to any amount or extent, and any provision or stipulation in any such contract or policy to the effect that the insured shall bear any portion of the loss on the property insured, are hereby declared to be null and void and the liability of the company, syndicate, association or corporation issuing the policy shall be the same as if no such agreement, stipulation or contract were contained in such policy; nor shall any such insurance company insert any condition, stipulation or agreement in any policy of insurance requiring a certificate from any notary public, justice of the peace or other magistrate or person, as to anything whatever connected with such insurance or loss, and any such condition or stipulation shall be void. Any person, company or association hereafter insuring any building or struc-

ture against loss or damage by fire, lightning or other hazard by a renewal of a policy heretofore issued or otherwise, shall cause such building or structure to be examined by the insurer or his agents, and a full description thereof to be made, and the insurable value thereof to be fixed by the insurer or his agent, and the amount of which shall be stated in the policy of insurance. In the absence of any change increasing the risk, without the consent of the insurer and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives, a premium shall be paid; and in case of a partial loss the full amount of the partial loss shall be paid, and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy, but in no case shall the insurer be required to pay more than the amount mentioned in the policy; provided, that, in the absence of fraud, the burden of proof to show an increase of risk by reason of any change in the ownership or condition of the structure or building upon which insurance is effected, either before or after loss arises, shall be upon the insurer; anything in the application or the policy of insurance to the contrary notwithstanding; provided, however, that it shall be lawful for such insurance companies, at the written request of the insured only, to issue, and it may be optional with the assured to accept a policy or contract of insurance containing a co-insurance clause or provision whenever a reduction in the rate for insurance on the property described in such policy is the consideration named for the taking of such co-insurance, and when so requested in writing, of which fact such writing shall be the only evidence and so accepted, the said co-insurance clause or provision shall be binding on the assured and on the company issuing such policy; provided, further, that the clause herein relating to co-insurance shall in no case apply to dwellings or to farm property, nor shall said clause apply to any risk wherein the total insurance shall be less than twenty-five thousand dollars on any one risk. Except grain elevators and warehouses and contents of same, and any person who solicits insurance and procures the application therefor, shall be held to be the agent of the party thereafter issuing the policy upon such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding. [As amd. approved, April 17, 1903.]

§ 51. **Loss payable to mortgagee.**— When by any agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor the whole or any part of the loss thereon is

payable to a mortgagee or mortgagees of the property or for their benefit the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement pay all mortgagees protected by such policy in the order of their priority of claim, as their claim shall appear, not beyond the amount for which the company is liable, and such payment shall be, to the extent thereof, payment and satisfaction of the liability of the company under such policy.

§ 53. **Standard policy; exceptions.**—No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form herein set forth, except as follows, to wit:

First — A company may print on or in its policies its name, location and date of incorporation, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at"

Second — A company may print or use in its policies printed forms of description and specification of the property insured, including permits for the use of electricity, gasoline or storage of other extra hazardous product or material, also for repairs and improvements for the operation or ceasing to operate and for the maintenance of sprinkling or other improvements.

Third — A company insuring against damage by lightning may print, in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and, in the clause providing for apportionment of loss in case of other insurance, the words, "whether by fire, lightning or both."

Fourth — A company incorporated or formed in this state may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement or by the laws of its own state or country, not contrary to the laws of this state.

Fifth — The blanks in said standard form may be filled in print or in writing.

Sixth — A company may print upon policies issued in compliance with the preceding provisions of this section the words "Minnesota standard policy."

Seventh — No provision shall be attached to or included in said policy limiting the amount to be paid in case of the total

loss on buildings to less than the amount of insurance on the same.

Printed form of policy.—The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to wit:

(Here follows the form, see page 501.)

(Balance of section 53.)

In case of joint policy.—When two or more companies [each having previously complied with the laws of this state] unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premium to be paid to each company, and the proportion of liability which each company agrees to assume.

And in the printed conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to the companies issuing such policy. [As amd. by General Laws of 1897, chap. 254.]

§ 54. **Penalty for violation of this act.**—Any insurance company, its officers or agents, or either of them, violating any provisions of this act by making, issuing, delivering or offering to deliver any policy of fire insurance on property in this state, except as herein provided, shall be guilty of a misdemeanor, * * * but any policy so made, issued and delivered shall, nevertheless, be binding upon the company issuing the same.
* * *

§ 55. **Adjustment; referees.**—In case of loss, except in case of total loss, on buildings under any fire insurance policy, issued on property in this state, and the failure of the parties to agree as to the amount of the loss, if the insurance company shall not, within five days after a written request to appoint one referee under the provisions for arbitration in such policy, name one man under such provision, who shall be a resident of this state and willing to act as such referee, it shall be deemed to have waived the right to an arbitration under such policy, and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage.

And in case of the failure of two referees, chosen, respectively, by the insurance company and the insured, to agree upon and select, within ten days from their appointment, a third referee willing to act in said capacity, either of the parties may within ten days from the expiration of said ten days, make written application, setting forth the facts to the judge of the district

court of the county wherein the fire occurred, and said judge shall thereupon make such appointment.

§ 82. **Insuring with unauthorized companies.**— Notwithstanding any other provision of this act, it shall be lawful for any person to obtain insurance in foreign companies not authorized to do business in this state, and it shall be lawful for such foreign companies to issue policies upon property situate in this state, but only in the manner provided in this section. Any person who desires the right to obtain such insurance, either on his own property or on the property of a firm or corporation in which he is interested, shall apply to the insurance commissioner for a license and file with him a bond as hereinafter provided; thereupon the commissioner shall issue to said applicant a license good for one year, authorizing him to procure for himself, or his firm or corporation, such outside insurance. And all insurance procured or issued under said license shall be lawful and valid, and all provisions in such policy of insurance relating to co-insurance, or other insurance, shall be construed and held to be in accordance with the standard policy by this act prescribed any provisions in such policy of insurance to the contrary notwithstanding; and nothing in this act shall be construed as preventing or abridging the right of any company issuing such insurance to enter this state for the purpose of inspecting the property insured, adjusting any loss or performing any act necessary or proper to the right conduct of its business and all matters pertaining thereto. * * *

MISSISSIPPI.

Laws of 1902, Chapter 59.*

§ 23. **No stipulation as to jurisdiction.**— No company shall make any condition or stipulation in its insurance contract concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the loss or injury, and any such condition or stipulation shall be void.

§ 33. **Amount of insurance; three-quarter clause; partial loss.**— No insurance company shall knowingly issue any fire insurance policy upon property within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than five years, but in suits brought upon policies of insurance against loss by fire, the insurer shall not be permitted to deny that the property insured was worth, at

* Sections 33 and 34, as amended in 1904. See Statutory Provisions, vol. 2.

the time of the issuing of the policy, the full value upon which the insurance was calculated. And in case the policy contains a three-quarter valuation clause, the insurer shall not deny that the amount of the policy was but three-fourths the value at the date of its issuance, and a similar rule shall apply, it matters not what proportion the amount of insurance bears to valuation according to the terms of the policy. In case of total loss of the property insured, the measure of damages shall be the amount for which the property was insured. In case of partial loss or damage by fire, the measure of damage shall be an amount equal to the damage done the property not to exceed the amount written in the policy.

And in case of losses on stocks of goods and merchandise, and other species of personal property, where the same after the issuance of the policy is constantly changed in specifics, quantity and value in the usual course of trade, only the actual value of the property at the time of the loss may be recovered, not to exceed the amount expressed in the policy.

In case of destruction or damage of property by fire where same is insured against fire, it shall be the duty of the insurance company or companies liable for such loss, within a reasonable time after receiving notice thereof, to furnish to the insured proper blanks upon which to make the required proof of such loss, with full directions as to what proof is required to secure the payment of the policy, and if the insurance company fails to comply with this section, the failure of the insured to make proper proof of loss prior to the suit shall be no defense to a suit upon the policy, and in all cases the insured shall have a reasonable time in which to make such proofs after the blanks and directions are received. Every insurance company transacting business in this State shall upon receiving notice of losses by fire of property in Mississippi on which it is liable under a policy of insurance forthwith notify the Insurance Commissioner thereof, and failing to do so, shall not be allowed to interpose any defense to a suit upon such loss.

§ 34. **Mortgagees protected in order of precedence; mortgagee clause.**— When by an agreement with the assured, or by the terms of the fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee or mortgagees of the property, for their benefit, the company shall, upon satisfactory proof of the right and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of the priority of claim as their claims shall appear, not beyond the amount

for which the company is liable, and such payment shall be to the extent thereof, payment and satisfaction of the liability of the company under such policy.

Each fire insurance policy taken out by a mortgagor or grantor in a deed of trust shall have attached, or shall contain, substantially the following mortgage clause, viz.: "Loss or damage, if any, under this policy, shall be payable (here insert name of the party), as mortgagee as his interest may appear, and this insurance, as to the interest of the mortgagee therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same. *Provided, also*, that the mortgagee shall notify the company of any change of ownership or occupation or increase of hazard which shall come to the knowledge of said mortgagee, and unless permitted by this policy, it shall be noted thereon and the mortgagee shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease, and this company shall have the right on like notice to cancel this agreement.

"Whenever this company shall pay the mortgagee any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee to recover the full amount of his claim.

• § 88. **Adjuster and adjustment.**—Any person acting as adjuster on a contract made otherwise than authorized by the laws

of this State, or by an insurance company or persons not regularly licensed to do business in this State, or who shall adjust or aid in the adjustment either directly or indirectly of a loss by fire on property located in this State, incurred on a contract not authorized by the laws of this State, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the Court.

§ 89. Every person who, either as principal or agent, or pretending to be such, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing of any contract of insurance of any kind otherwise than this Act permits, shall be deemed guilty of a misdemeanor, and on conviction, shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or to be imprisoned not less than one nor more than two years, or both, in the discretion of the Court.

MISSOURI.

Revised Statutes, 1899, Volume 2.

§ 7969. **Full amount of policy to be paid.**— In all suits brought upon policies of insurance against loss or damage by fire hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount for which the property is insured, the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss, the measure of damage shall be that portion of the value of the whole property insured, ascertained in the manner hereinafter prescribed, which the part injured or destroyed bears to the whole property insured.

§ 7970. **Property insured in more than one company.**— When fire insurance policies shall be hereafter issued or renewed by more than one company upon the same property, and the suit shall be brought upon any of said policies, the defendant

shall not be permitted to deny that the property insured was worth the aggregate of the several amounts for which it was insured at the time the policy was issued or renewed thereon, unless willful fraud or misrepresentation is shown on the part of the insured in obtaining such additional insurance; and in such suit the measure of damage shall be as provided in the preceding section: *Provided*, that whatever depreciation in value below the amount for which the property is insured may be shown, as provided in the preceding section, shall be deducted from the amount insured in each policy, in the proportion which the amount in each such policy bears to the aggregate of all the amounts so insured on such property. This and the preceding section shall apply only to real property insured. Any condition in any policy of insurance contrary to the provisions of this article shall be illegal and void.

§ 7971. **Partial loss.**— Whenever there is a partial destruction or damage to property covered by insurance, it shall be the duty of the party writing the policies to pay the assured a sum of money equal to the damage done to the property, or repair the same to the extent of such damage, not exceeding the amount written in the policy, so that said property shall be in as good condition as before the fire, at the option of the insured.

§ 7972. **Co-insurance; proviso.**— No fire insurance policy which may be issued after this section takes effect shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be occasioned by fire or lightning to the property covered by such policy, nor making provisions for a reduction of such loss or damage, or any part thereof, by reason of the failure of the assured to take out and maintain other insurance upon said property. And all clauses and provisions in fire policies, issued after the taking effect of this section, in contravention of the prohibitions in this section contained, shall be ab initio void and of no effect: *Provided*, that the provisions of this section shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand inhabitants or more whenever the insured sign an agreement endorsed across the face of said policy to be exempt from the provisions thereof. [As amd. and approved March 20, 1903.]

§ 7976. **Adjustments, etc., and examinations of books, etc., where had.**— That all adjustments, arbitrations, settlements and

examinations of books, invoices and accounts shall be had at the town, city or neighborhood where the fire occurs, unless some other place be agreed upon between the insurer and the assured, after the loss shall have occurred without regard to any provision in the policy to the contrary.

§ 7977. **After notice of loss, company to furnish blanks.**— Whenever any loss or damage shall be suffered in this state from fire, by any person, persons or corporation, upon property insured under a policy of insurance of any fire insurance company doing business in this state, and notice of the fact that such loss or damage has occurred shall be given by the person, persons or corporation incurring the same, or the agent thereof, to the insurance company issuing such policy, or to the agent thereof nearest the place of loss, within a reasonable time after the date of such loss or damage — the limit to which reasonable time shall be mentioned in said policy and made a part thereof at the time of issuing the same, but the time fixed in the policy shall not be taken or construed to be a condition precedent to the right of recovery — then it shall thereupon become the duty of such insurance company to furnish to the person, persons or corporation incurring such loss or damage, such blank forms of statements and proofs of loss as such insurance company may desire to be filled out, in regard to the time, origin and circumstances of the fire causing such loss or damage, and the knowledge and belief of the insured touching the same, the lists and description and quantity of property destroyed or damaged, and of property saved, and the original cost of such property, and the cash value thereof at the time of the fire, the details as to possession, ownership, title and incumbrances, and changes of title, use, occupation, possession, ownership, location and exposures since the time of issuing such policy, if any, and other insurance, if any, and description and schedules in such policy.

§ 7978. **Effect of failure to furnish.**— If any such fire insurance company shall fail, neglect or refuse to furnish blank forms of statements and proofs of loss to the insured, in case of loss or damage by fire, as provided in the preceding section, then such company shall be deemed to have waived the requiring of any such statements or proofs of loss at the hands of such insured person, persons or corporation, and upon suit brought upon such policy, such insurance company shall not be heard to complain of the failure of the insured to furnish any such statements or proofs of loss, any provision in any such policy of insurance to the contrary notwithstanding.

§ 7979. **Uniform form of policy; three-quarter risk.**— Fire insurance companies doing business in the state of Missouri are

hereby required, on or before the first day of January of the year 1896, to agree upon a uniform form of policy for use by them in the state of Missouri, covering the responsibilities of the companies as well as the duties of the assured, to be classed and known as the Missouri fire insurance policy. Said policy shall be approved of by the insurance commissioner of this state, and after the first day of January, A. D. 1896, no policy shall be issued in this state carrying risks by fire or lightning by any company which does not embrace the form made and approved of as herein directed. To all such policies shall be attached a blank notice, with the address of the company fully printed thereon, to be used by the assured in case of loss in notifying the company of such loss, which notice shall be given within ninety days thereafter. The appearance of an adjuster of any company at the place of fire and loss in which said company is interested by reason of an insurance on such property, shall be considered evidence of notice, and to be held as a waiver of the same on the part of the company. No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding.

§ 8012. **Damages, when recoverable.**— In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent.* on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict. [As amd. by Laws of 1899, p. 254.]

MONTANA.

Codes Annotated, 1895, Volume 2. (Civil Code.)

§ 3393. **Assignment to mortgagee of thing insured.**— Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

* See page 522, note.

§ 3394. **New contract between insurer and assignee.**— If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

§ 3460. **Valued policy, what.**— A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

§ 3494. In case of an over-insurance by several insurers, the insurer is entitled to a ratable return of the premium, proportional to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

§ 3495. When an over-insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned, in proportion to the amount insured by their respective policies.

§ 3496. When an over-insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

§ 3500. **Perils, remote and proximate.**— An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

§ 3501. **Loss incurred in rescue from peril.**— An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

§ 3502. **Excepted perils.**— Where a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.

§ 3503. **Negligence and fraud.**— An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.

§ 3510. **Notice of loss.**— In case of loss upon an insurance against fire, an insurer is exonerated if notice thereof be not given to him by some person insured, or entitled to the benefit of the insurance, without unnecessary delay.

§ 3511. **Preliminary proofs.**—When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

§ 3512. **Waiver of defects in notice, etc.**—All defects in a notice of loss, or in preliminary proofs thereof which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

§ 3513. **Waiver of delay.**—Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

§ 3514. **Certificate, when dispensed with.**—If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

§ 3521. **Contribution in case of double insurance.**—In case of double insurance, the several insurers are liable to pay losses thereon as follows:

1. In fire insurance, each insurer must contribute ratably towards the loss, without regard to the dates of the several policies. * * *

§ 3553. **Measure of the indemnity.**—If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured, in the condition in which it was at the time of the injury; but a valuation, fraudulent in fact, entitles the insurer to rescind the contract.

NEBRASKA.

Compiled Statutes, 1901.

3451. **Value in policy.**—Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured, or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of

the property insured, and the true amount of loss and measure of damages.

NEVADA.

Compiled Laws, 1900.

921. § 19. **Unearned premiums to be returned in certain cases.**—In the event of the total destruction of any insured property on which the amount of the appraised or agreed loss shall be less than the total amount insured thereon, the insuring company or companies, shall return to the insured the unearned premium for the excess of insurance over the appraised, or agreed loss, to be paid at the same time, and in the same manner as the loss shall be paid.

NEW HAMPSHIRE.

Public Statutes, 1901, Chapter 170.

§ 1. **Form of insurance contract established; how changed (L. 1885, chap. 93, § 3).**—The form of policy and insurance contract now in force in the state is continued until the insurance commissioner shall change it. He is authorized to change the form of such contract from time to time as he may think the public good requires. Any company using any other form of policy than the one prescribed shall forfeit its license.

(As the provisions of this Act are required to be printed in or upon the policy as part of it, and are printed in this volume, p. 508, they are omitted here.)

NEW JERSEY.

Laws of 1902, Chapter 134.

77. **Standard form of fire insurance policy.**—The commissioner of banking and insurance having in accordance with law prepared a printed form in blank, of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon, and form a part of such contract or policy, and filed the same in the office of the secretary of state, on or before the first day of July, one thousand eight hundred and ninety-two, similar in all respects, except as herein-after mentioned, to the contract or policy of fire insurance provided by law for the states of Pennsylvania and New York, such form being known and designated as the "Standard fire insurance policy of the states of New York, Pennsylvania and New Jersey," no fire insurance company, corporation or association,

their officers or agents, shall make, issue, use or deliver for use, any fire insurance policy, or a renewal of any fire policy on property in this state other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions, with such printed form of contract or policy filed in the office of the secretary of state as aforesaid, and no other or different provisions, agreement, condition or clause shall in any manner be made a part of said contract or policy, or be endorsed thereon or delivered therewith, except as follows, to wit:

I. **Name, location, date.**—The name of the company, its location and place of business, the date of its incorporation or organization, whether it is a stock or mutual company, the names of its officers, the number and date of the policy, and if it be issued through a manager or agent, the words "this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at," may be printed on policies issued on property in this state;

II. **Matters clearly expressed.**—Printed or written forms of description and specification, or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with, or a waiver of any of the provisions or conditions of the standard policy herein provided for), may be written upon or attached or appended to any policy issued on property in this state;

III. **Legal provisions may be printed.**—A company, corporation or association organized or incorporated under and in pursuance of the laws of this state or elsewhere, if entitled to do business in this state, may, with the approval of the commissioner of banking and insurance, if the same is not already included in the standard form filed in the office of the secretary of state, as aforesaid, print on its policies any provision which it is by law required to insert therein, if such provision is not in conflict with the laws of this state, or of the United States, or of the provisions of the standard form provided for herein; but said provision or provisions shall be printed apart from the other provisions, agreements or conditions of the policy, under a separate title, as follows: "Provisions required by law to be stated in this policy."

Any policy issued contrary to the provisions of this section shall nevertheless be binding upon the company issuing the same.

78. Co-insurance clause in fire policy.— No fire insurance company doing business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the insured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire or lightning to the property described in such policy, and any such clause or provision shall be null and void and of no effect; *provided*, that it may be optional with the insured to accept a policy or contract of insurance containing a co-insurance clause or provision when a reduction in the rate for insurance on the property described in such policy is the consideration named in such clause, and when so accepted the co-insurance clause or provision shall be binding on the insured.

79. Appraisement clause in fire policy.— When any contract or policy of fire insurance covering property in this state contains any clause or provision for the ascertainment by appraisers of the amount of any loss or damage to the property described in such contract or policy, and the clause or provision of such ascertainment of loss by appraisers provides that the insured and the insurer shall each select an appraiser and the two appraisers so chosen shall select an umpire, and the loss to the property described in such contract or policy of fire insurance shall have occurred, and the insured and the insurer shall have each selected an appraiser, and the appraisers so selected shall have failed or neglected, for a space of ten days after they have both been chosen, to agree upon and select an umpire, it shall be lawful for either the insured or the insurer to apply to the inferior court of common pleas of the county in which said property is or was situated, on five days' notice, in writing, to the other party of his or its intention so to do, to appoint a competent and disinterested umpire; and said notice in writing, when served by the insured, may be served upon any local agent of the insurer; and the judge or judges of said inferior court of common pleas shall, on proof by affidavit of the failure or neglect of the said appraisers to agree upon and select an umpire within the time aforesaid, and of the service of notice aforesaid, forthwith appoint a competent and disinterested person to act as umpire in the ascertainment of the amount of said loss; and the acts of the umpire so appointed shall be binding upon the insured and the insurer to the same extent as if such umpire had been selected in the manner provided for in said contract or policy of insurance.

NEW YORK.

Insurance Law of 1892.

General Laws, Chapter 38.

§ 121. **Standard fire insurance policy to be prescribed and used.**— The printed blank form of a contract or policy of fire insurance, with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, heretofore filed in the office of the secretary of state by the superintendent of insurance or by the New York board of fire underwriters pursuant to the provisions of chapter 488 of the laws of 1886 shall be transferred by the secretary of state to the office of the superintendent of insurance and, together with such provisions, agreements or conditions as may be previous to the thirty-first day of December, nineteen hundred and one, be filed by the New York board of fire underwriters in the office of the superintendent of insurance and approved by him, which provisions, agreements or conditions shall be void if they are inconsistent with the standard fire insurance policy heretofore filed in the office of the secretary of state, shall be known and designated as the “standard fire insurance policy of the state of New York.” No fire insurance corporation, its officers or agents, shall make, issue, or deliver for use, any fire insurance policy or the renewal of any such policy on property in this state, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with such printed blank form of contract or policy; and no other different provision, agreement, condition or clause shall be in any manner made a part of such policy or indorsed thereon or delivered therewith, except as follows, to wit:

First. The name of the corporation, its location and place of business, date of its incorporation or organization, whether it is a stock or mutual corporation, the names of its officers, the number and date of the policy, and if issued through a manager or agent the words “this policy shall not be valid until countersigned by the duly authorized manager or agent of the corporation at”

Second. Printed or written forms of description and specification or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk not inconsistent with or a waiver of any of the conditions or provisions of the standard policy herein provided for.

Third. With the approval of the superintendent of insurance, if the same is not already included in such standard form, any provision which any such corporation is required by law to insert in its policies, not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements or conditions of the policy under a separate title as follows: "Provisions required by law to be stated in this policy."

The name, with the word "agent" or "agents," and place of business, of any insurance agent or agents, either by writing, printing, stamping or otherwise, may be indorsed on the outside of such policies.

It shall not be lawful for any association of individual underwriters known as Lloyds to stamp, print or write, or otherwise cause or permit to be stamped, written or printed upon any fire insurance policy issued by it any words which may in any way tend to convey the impression that such policy is in form or substance the standard form of policy prescribed by this act for the use of corporations authorized by law to transact the business of fire insurance within this state. [As amd. by L. 1901, chap. 513, and L. 1903, chap. 106.]

Presenting false proofs of loss.— A person who, knowing it to be such, either presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss upon a contract of insurance; or prepares, makes, or subscribes a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim: Is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. [Penal Code, § 579, as amd. by Laws of 1882, chap. 384.]

NORTH CAROLINA.

Public Laws of 1899.

§ 23. **Relating to suits with or by such company.**—No such company shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the cause of action accrues, and any such condition or stipulation shall be void.

§ 40. **Liability of company for buildings destroyed.**— When buildings insured against loss by fire and situated within this

state are totally destroyed by fire, the company shall not be liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it shall appear that the insured has paid premium on a sum in excess of said actual value, the assured shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum per annum from the date of issue. Every insurance company transacting business in this state shall, upon receiving notice of loss by fire of property in North Carolina, on which it is liable under a policy of insurance, forthwith notify the insurance commissioner thereof, and no insurance upon any such property shall be paid by any company until one week after such notification.

§ 41. **When policy is payable to mortgagee.**— Where by an agreement with the assured or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee or mortgagees of the property for their benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims shall appear, not beyond the amount for which the company is liable, and such payments shall be to the extent thereof, payment and satisfaction of the liabilities of the company under such policy.

§ 43. **Standard fire insurance form.**— No fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form filed in the office of the insurance commissioner of the state, known and designated as the standard fire insurance policy of the state of North Carolina, except as follows:

a. A company may print on or in its policies its name, location and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and if it be issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at," and after the words "standard fire insurance policy of the state of North Carolina," on the back of the form, the names of such other states as have adopted this standard form.

b. A company may use in its policies written or printed forms of description and specification of the property insured.

c. A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the addi-

tional words, "Also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning, or both."

d. A company may write or print upon the margin or across the face of a policy, or write or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders and provisions must be signed by the officers or agents of the company so using them.

e. Every mutual company shall cause to appear in the body of its policy the total amount for which the assured may be liable, under the charter of said company.

f. The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than the type used in printing the said form on file in the office of the insurance commissioner, and shall be as follows, to wit:

g. Appraisers.—No provisions of this act shall be construed to limit insurance companies to the use of any particular size or manner of folding the paper upon which their policies may be issued. And the word "together" in line two hundred and fifty-nine,* section forty-three, shall not be construed to forbid the making of estimates by either of the appraisers when not in the presence of the other, but only that they shall come together for a final estimate and appraisal of the loss or damage. [As amd. by Public Laws, 1901, chap. 391, § 4.]

§ 44. *Use of forms other than standard, unlawful.*—Any insurance company which shall cause to be issued, and any agent who shall make, issue, or deliver a policy of fire insurance other than the standard form of fire insurance policy, in wilful violation of this act, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but such policy shall nevertheless be binding upon the company issuing the same.

§ 105. *Insurance by individuals.*—No action shall be maintained in any court in the State upon any policy or contract of fire insurance issued upon any property situated in the State by any company, association, partnership, individual or individuals that have not been authorized by the Insurance Commissioner to transact such insurance business.

§ 106. *Limitation.*—No person licensed to do insurance business under this act shall limit the term within which any suit shall be brought against such person to a period less than one year from the time when the loss insured against shall accrue,

* See line 88 in form, page 479.

or to less than six months from any time at which a plaintiff shall take a nonsuit to an action begun within the legal time.

§ 114. **Persons acting as adjusters contrary to this act guilty of misdemeanor.**— Any person acting as adjuster on a contract made otherwise than authorized by the laws of this State, or by any insurance company or persons not regularly licensed to do business in the State, or who shall adjust or aid in the adjustment, either directly or indirectly, of a loss by fire on property located in this State, incurred on a contract not authorized by the laws of the State, shall be deemed guilty of a misdemeanor, and shall upon conviction be fined not less than one hundred dollars or more than five hundred dollars, one-half to go to the sheriff or informant, or imprisoned not less than six months or more than two years, or both, in the discretion of the court.

NORTH DAKOTA.

Revised Codes, 1899.

§ 4448. **Assignment to mortgagee; insurance of mortgaged property.**— When a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

§ 4449. **Same; new contract.**— If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee and at the time of his assent imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his right.

§ 4489. **Applied only to interest.**— When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

§ 4490. **Insurance by trustee or agent.**— When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as an agent or trustee or by other general words in the policy.

§ 4491. **Terms govern joint or common interest.**— To render an insurance effected by one partner or part owner, applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

§ 4492. **Only person intended may claim benefit.**—When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

§ 4493. **Benefit of any owner.**—A policy may be so framed that it will inure to the benefit of whomsoever during the continuance of the risk may become the owner of the interest insured.

§ 4494. **Transfer suspends.**—The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes owner of both the policy and the thing insured.

§ 4495. **Classified.**—A policy is either open or valued.

§ 4496. **Open.**—An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

§ 4497. **Valued.**—A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

§ 4498. **Running.**—A running policy is one which contemplates successive insurance and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

§ 4521. **When insurer liable.**—An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

§ 4522. **Liable for loss in rescuing.**—An insurer is liable when the thing insured is rescued from a peril insured against that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to peril, not insured against, which permanently deprives the insured of its possession in whole or in part; or when a loss is caused by efforts to rescue the thing insured from a peril insured against.

§ 4523. **Not liable for a peril excepted.**—When a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted.

§ 4524. **Willful act exonerates; negligence not.**—An insurer is not liable for a loss caused by the willful act of the

insured; but he is not exonerated by the negligence of the insured or of his agents or others.

§ 4525. **Notice of loss without unnecessary delay.**— In case of loss upon an insurance against fire an insurer is exonerated, if notice thereof is not given to him by some person insured, or entitled to the benefit of the insurance without unnecessary delay.

§ 4526. **Only best proof in power required.**— When preliminary proof of loss is required by a policy the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

§ 4527. **Defects in, how waived.**— All defects in a notice of loss or in preliminary proof thereof which the insured might remedy and which the insurer omits to specify to him without unnecessary delay as grounds of objection are waived.

§ 4528. **Delay in, how waived.**— Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objections promptly and specifically upon that ground.

§ 4529. **Time in which to make; blanks to be furnished.**— Upon notice of loss being given to the insurer on behalf of the insured or of a beneficiary under a policy of life insurance the insured shall within twenty days after receipt of such notice furnish to the insured or beneficiary, as the case may be, a blank form of proof of loss and the insured shall have sixty days after such blank form is furnished in which to make such proof of loss; * * * If the insurer shall fail to furnish such blank form of proof of loss within the time aforesaid he shall be deemed to have waived such proof and any agreement made to waive the provisions of this section is void.

§ 4530. **Failure to furnish certificate of another.**— If a policy requires by way of preliminary proof of loss the certificate or testimony of another person than the insured, it shall be sufficient for the insured to use reasonable diligence to procure it and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

§ 4532. **Contribution of insurers.**— In case of double insurance the several insurers are liable to pay losses thereon as follows:

1. In fire insurance each insurer must contribute ratably towards the loss without regard to the dates of the several policies. * * *

§ 4607. **Measure of indemnity.**— If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.

§ 4608. **Standard policy.**— No fire insurance company, corporation or association, their officers or agents, shall make, issue, use, or deliver for use any fire insurance policy or renewal of any fire policy on property in this state other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form of contract or policy heretofore filed in the office of the commissioner of insurance as a standard form for this state and no other or different provision, agreement, condition or clause shall in any manner be made a part of such contract or policy or be indorsed thereon or delivered therewith, except as follows, to wit:

1. The name of the company, its location and place of business, the date of its incorporation or organization, and the state or country under which the same is organized, the amount of paid up capital stock, whether it is a stock or mutual company, the names of its officers, the number and date of the policy; and if it is issued through a manager or agent of the company, the words, "this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at " may be printed on policies issued on property in this state.

2. Printed or written forms of description and specifications or schedules of the property covered by any particular policy and any other matter necessary to express clearly all the facts and conditions of insurance on any particular risk, which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for, may be written upon or attached or appended to any policy issued on property in this state.

3. A company, corporation or association organized or incorporated under and in pursuance of the laws of this state or elsewhere, if entitled to do business in this state, may with the approval of the commissioner of insurance, if the same is not already included in the standard form as filed in the office of the commissioner of insurance, print on its policies any provision which it is required by law to insert therein, if such provision is not in conflict with the laws of this state or the United States, or of the provisions of the standard form provided for herein, but said provision shall be printed apart from the other provisions, agreements or conditions of the policy and in type not

smaller than the body of the policy and under a separate title, as follows: "Provisions required by law to be stated in this policy" and be a part of said policy.

4. There may be indorsed on the outside of any policy herein provided for, the name, with the words "agent or agents" and place of business, of any insurance agent or agents, either by writing, printing, stamping or otherwise.

5. When two or more companies, each having previously complied with the laws of this state, unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract, also the proportion of premiums to be paid to each company and the proportion of liability which each company agrees to assume. And in the printed conditions of such policy the necessary change may be made from the singular to the plural number, when reference is had to the companies issuing such policies.

§ 4609. **Construction of standard policy.**—Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed.

OHIO.

Bates' Annotated Statutes (3d Ed.), 1900, Volume 2.

§ 3643. **Extent of liability under policy of insurance.**—Any person, company, or association hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid; and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy; but in no case shall the insurer be required to pay more than the amount mentioned in its policy.

ard fire insurance policy of the State of Pennsylvania," and it shall be the duty of the insurance commissioner to forward to each fire insurance company transacting business in this State a certified copy of such form of policy and riders thereto, as provided for in the second and third sections of this act.

I. The name of the company, its location and place of business, the date of its incorporation or organization, whether it is a stock or a mutual company, the names of its officers, the number and date of the policy, and, if it be issued through a manager or agent, the words, "This policy shall not be valid until countersigned by the duly authorized manager or agent at," shall be printed on policies issued in this state.

II. Printed or written forms of description, and specifications or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with, or a waiver of, any of the provisions or conditions of the standard policy herein provided for), may be written upon, or attached or appended to, any policy issued on property in this state. In like manner, it shall be the duty of the insurance commissioner to prepare and file, as herein provided, a standard form of policy or contract of insurance to be used for perpetual insurance, by such companies as are authorized by law to issue perpetual policies, and the conditions of this act, as to a standard form of policy, shall apply thereto.

III. A company, corporation or association, organized or incorporated under and in pursuance of the laws of this state or elsewhere, if entitled to do business in this state, may, with the approval of the insurance commissioner, if the same is not included in the standard form to be filed as aforesaid, print on its policies any provision which it is by law required to insert therein, if such provision is not in conflict with the laws of this state or of the United States, or of the provisions of the standard form herein provided for; but said provision or provisions shall be printed apart from the other provisions, agreements or conditions of the policy, under a separate title as follows: "Provisions required by law to be stated in this policy."

97. **All policies issued to conform to this act.**—On and after May 1, 1892, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use, any fire insurance policy, or a renewal of any fire policy, on property in this state, other than such as shall conform in all particulars as to blanks, context, provisions, agreements and

conditions, with the printed form of contract or policy on file in the insurance department, as provided for in the first section of this act, and no other or different provision, agreement, condition or clause, shall, in any manner, be made a part of said contract or policy, or be endorsed thereon, or delivered therewith, except as hereinbefore provided for.

98. **Penalty for violation of act.**— Any insurance company, its officers or agents, or either of them, violating any of the provisions of this act, by making, issuing, delivering or offering to deliver, any policy of fire insurance on property in this state, except as hereinbefore provided for, shall be guilty of a misdemeanor. * * *; but any policy so made, issued and delivered, shall, notwithstanding, be binding upon the company issuing the same: *Provided, however,* That nothing in this act shall be construed as affecting perpetual insurance now in force.

99. **Furnishing of notice and proofs of loss by fire.**— Hereafter when any property shall be destroyed by fire in this commonwealth, where the same is covered by policies of insurance, either held by the assured or an assignee of the same as collateral security, the conditions of insurance as to the notice of loss, and the furnishing of preliminary proofs shall be deemed to have been complied with, if the assured or the assignee, or either of them, shall furnish the company, at its general office, or to the agent of the company who countersigned the policy or policies of insurance, the notice of loss, within ten days from the date of the fire, and the preliminary proofs within twenty days from said date: *Provided,* That in case the agent who countersigned the policy or policies shall have been removed, or succeeded by some other agent of the company, after such policy was written, and prior to the date of the fire, then the notice and preliminary proofs aforesaid may be served on any other agent of the company authorized to effect contracts of insurance and countersign policies of any such insurance companies.

RHODE ISLAND.

General Laws, 1896, Chapter 183.

§ 4. **The standard form of fire insurance policy to be adhered to excepting as to.**— No fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form herein set forth, except as follows, to wit:

First. Distinguishing words to denote company.— A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy,

and, if it is issued through an agent, the words, "This policy shall not be valid until countersigned by the duly authorized agent of the company at"

Second. Description of property insured.— A company may print on or use in its policies printed forms of description and specification of the property insured.

Third. Provisions of law.— A company incorporated or formed in this state may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provisions required by its charter or deed of settlement or by the laws of its own state or country, not contrary to the laws of this state: *Provided*, that the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such a way as to affect the question of loss, to be appended to the policy by a slip or rider as hereinafter provided.

Fourth. Blanks may be filled by print or writing.— The blanks in said standard form may be filled in print or writing.

Fifth. Words to denote that the policy is of standard form.— A company may print upon policies issued in compliance with the preceding provisions of this section the words "Standard Fire Insurance Policy of the State of Rhode Island," and may also mention the names of other states known to have adopted this same form.

Sixth. Modifications of the standard form, how to be stated.— A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer or ten-point Roman, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

§ 5. **Standard form, how to be printed and how to be read.**— The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than brevier or eight-point Roman, and shall be as follows, to wit:

(Here follows form, see page 474.)

§ 6. Any insurance company or agent who shall make, issue, or deliver a policy of fire-insurance in wilful violation of the preceding two sections or any part thereof, shall forfeit for each offence not less than fifty nor more than two hundred dollars; but such policy shall nevertheless be binding upon the company issuing the same.

SOUTH CAROLINA.**Code of Laws, 1902, Volume 1.**

§ 1816. **Amount of policy on property, values to be stated; liability of company; contributive insurance.**— No fire insurance company or individuals writing fire insurance policies, doing business in this State, shall issue policies for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of insurance to be fixed by insurer and insured at or before the time of issuing said policies, and in case of total loss by fire, the insured shall be entitled to recover the full amount of insurance and a proportionate amount in case of partial loss: *Provided*, Two or more policies written upon the same property shall be deemed and held contributive insurance; and if the aggregate sum of all such insurance exceed the insurable value of the property, as agreed by the insurer and the insured, in the event of a total or partial loss, each company shall be liable for its pro rata share of said insurance.

§ 1817. **Limits as to time within which statements in application may be disputed.**— No statement in the application for insurance shall be held to prevent a recovery before a jury on said policy in case of partial or total loss: *Provided*, after the expiration of sixty days, the insurer shall be estopped to deny the truth of the statement in the application for insurance, which was adopted except for fraud in making their application for insurance.

§ 1818. **Exceptions as to personalty.**— Nothing in sections 1816 and 1817 shall be held to apply to insurance on chattel or personal property.

SOUTH DAKOTA.**Annotated Statutes, 1901, Volume 2.**

4025. **State auditor to file printed form of blank; uniform policy.***— The state auditor shall prepare and file in his office on or before the first day of August, eighteen hundred and ninety-three, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon, or added thereto, and form a part of such contract or policy of fire insurance, and such forms when so filed shall be known and designated as the South Dakota Standard Policy. The state auditor shall, as near as the same can be made applicable, conform to the type and form

* Form changed by L. 1905, ch. 126. See page 520a.

of the New York Standard Fire Insurance Policy, so called, and known; provided, however, that five days' notice of cancellation by the company shall be given, and provided that proof of loss shall be made within sixty days after a fire.

4028.* Uniform policy to take effect, when; style of contract.

— On and after the first day of October, Anno Domini eighteen hundred and ninety-three, no fire insurance company, corporation or association, their officers or agents, shall make, issue, use, or deliver for use, any fire insurance policy or renewal of any fire policy on property in this state other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions, with the printed form of contract or policy so filed in the office of the state auditor as provided for in the first section of this act, and no other or different provision, agreement, condition or clause shall in any manner be made a part of such contract or policy, or be indorsed thereon or delivered therewith except as follows, to wit:

1. The name of the company, its location and place of business, the date of its incorporation or organization, and the state or country under which the same is organized, the amount of paid-up capital stock, the names of its officers, the number and date of the policy; and if it be issued through a manager or agent of the company, the words "this policy shall not be valid until countersigned by the duly authorized manager or agent of the company at," may be printed on policies issued on property in this state.

2. Printed or written forms of description and specification or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance of any particular risk (which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the Standard Policy herein provided for) may be written upon or attached or appended to any policy issued on property in this state.

3. There may be indorsed on the outside of any policy herein provided for, the name with the words "agent or agents" and place of business of any insurance agent or agents, either by printing, writing, stamping or otherwise.

4. Where two or more companies (each having previously complied with the laws of this state) unite to issue a joint policy, there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premiums to be paid each company and proportion of liability which each company agrees to assume; and in the printed

* This section superseded or repealed and new form prescribed by L. 1905, ch. 126. See page 520a.

conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to the companies issuing such policies.

5. A company or corporation or association, organized or incorporated under and in pursuance of the laws of this state or elsewhere, if entitled to do business in this state, may with the approval of the state auditor, if the same is not already included in the standard form to be filed in the office of said state auditor, as provided for in the first section of this act, print on its policies any provision which it is required by law to insert therein, if such provision is not in conflict with the laws of this state or the United States or of the provision of the standard form provided for herein, but said provision or provisions shall be printed apart from the other provisions, agreements or conditions of the policy and in type not smaller than the body of the policy and under a separate title as follows: "Provisions required by law to be stated in this policy," and be a part of said policy.

4029. **Penalty.**—Any insurance company, its officers or agents, or either of them violating any provisions of this act by making, issuing, delivering or offering to deliver any policy of fire insurance on property in this state, except as hereinbefore provided, shall be guilty of a misdemeanor * * *; but any policy so made, issued and delivered, shall be binding upon the company issuing the same, and such company shall thereafter be disqualified from doing any insurance business in this state.

5290. **Insurance of mortgaged property.**—Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise void the insurance will have the same effect, although the property is in the hands of the mortgagee.

5291. **Mortgaged property; new contract.**—If the insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

5230. **Insurance by trustee or agent.**—When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured, may be indicated by describing him as an agent or trustee, or by other general words in the policy.

5337. **Valued policy.**— A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

5358. **Insurer liable, when.**— An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

5359. **Other cases.**— An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to peril, not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

5360. **Exception includes consequences.**— Where a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril, is thereby excepted; although immediate cause of the loss was a peril which was not excepted.

5361. **Acts of insured.**— An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.

5362. **Notice of loss given without unnecessary delay.**— In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by some person insured, or entitled to the benefit of the insurance, without unnecessary delay.

5363. **What proof required.**— Where preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

5364. **Waiver of defects.**— All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

5365. **Waiver of delays.**— Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

5366. **Reasonable diligence.**— If a policy requires, by way of preliminary proof of loss, the certificate or testimony of another person than the insured, it is sufficient for the insured to use

reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of his belief in the facts necessary to be certified.

5368. **Double insurance; order of liability.**—In case of double insurance, the several insurers are liable to pay losses thereon as follows:

1. In fire insurance, each insurer must contribute ratably toward the loss, without regard to the dates of the several policies

* * *

5443. **Measure of indemnity.**— If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the full amount stated in the policy; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance. [L. 1903, chap. 162.]

§ 1. **Amount of policy on buildings; measure of damage.**— Whenever any policy of insurance shall be written to insure any real property in this state including structures on land owned by another than the insured, against loss by fire, tornado or lightning, and that property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.

§ 2. **Application of act.**— This act shall apply to all policies of insurance hereafter made or written upon real property including structures situated upon land owned by another than the insured in this state, and also to the renewals which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

§ 3. **Attorney's fees.**— The court upon rendering judgment against an insurance company, upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs.

TENNESSEE.

Code, 1896.

3333. **Adjustment of loss or damage.**— In case of loss or damage after the insurance is effected, it shall be lawful for such loss or damage to be adjusted and paid in the manner and by the means usual with insurers and the assured for so doing. No penalty whatever shall be incurred by any inspector or

adjuster, or other person, for participating *bona fide* in these transactions.

3339. **Notice; publication, when.**—Notice of loss under any policy contemplated under this article shall be mailed by registered letter to home office of company in which loss occurs, and in case said company fails to designate its attorney, upon whom service shall be perfected in case suit on said loss is brought within ten days after reception of said registered letter, then service shall be perfected on said company by publication, as prescribed by the general laws of the state, when service by publication is necessary, and said company shall file with the insurance commissioner an agreement to abide by and accept said service as final before being allowed to place a policy in this state.

Acts of 1893, Chapter 107.

§ 1. * * * **Valued policy.**—That insurance companies shall pay their policy-holders the full amount of loss sustained upon property issued by them: *Provided*, Said amount of loss does not exceed the amount of insurance expressed in the policy, and that all stipulations in such policies to the contrary are, and shall be, null and void. *Provided, however*, That insurance policies issued upon cotton in bales shall not be subject to the provisions of this act.

Preceding act was amended by L. 1908, chap. 539, as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee:* That an Act entitled "An Act to compel insurance companies to pay the full amount of the loss sustained upon property covered by policies of insurance up to the amount expressed in the policies notwithstanding any stipulation in such policies to the contrary," being chapter 107 of the Acts of the General Assembly of the State of Tennessee for the year 1893 be, and the same is hereby amended by adding at the end of the first section of said Act, the following:

"Provided, however, That a three-quarter value limit clause may be applied to a policy of insurance if it is left optional with the insured whether he will accept said clause or not, and said option is, in fact, given him, and when accepted by the policy holder it shall be a valid contract between the company and the policy holder *provided however*, that said clause shall be absolutely void even if accepted by the policy holder except under the following conditions, to-wit:

"1. Said three-fourths clause shall be printed in bold type across the face of the policy or on a separate form as a special agreement, this separate form to be also printed in clear type of reasonable size, and it shall provide therein in event of loss, if it appears that there is an excess in the face of the policy over and above seventy-five per cent (75%) of the cash value of the property insured, *that the company shall return to the assured all premiums that have been paid on such excess*, and it shall also be a condition precedent to the validity of said three-fourths value limit clause that the insurance company has given to the insured accepting such a clause upon any policy, *not less than twenty-five per cent (25%) reduction from the present basis rate as shown by the rate sheets in the office of the Insurance Commissioner*, and, if the basis rate should be lowered, then said reduction of not less than twenty-five per cent shall be given from such lowered basis rate, but, if in any case, the basis rate be raised from the present existing rate, said three-fourth clause even if applied with the consent of the assured, and said reduction is given, it shall be absolutely null and void as to said policy.

"*Provided also*, A co-insurance clause in a policy, or attached in the form of a rider, shall be valid if printed in clear bold type either across the face of the policy or on said rider, and accepted by the insured after the option to accept same or reject same has been given him, *provided*, that, if said co-insurance clause is accepted by the policy holder it shall be a condition precedent to its validity that the assured has been allowed a reduction from the present basis rate, as shown by rate sheet now on file in the Office of the Insurance Commissioner of not less than five per cent. on seventy per cent. co-insurance clause, not less than ten per cent. on an eighty per cent. co-insurance clause, and not less than fifteen per cent. on a ninety per cent. co-insurance clause, and if the present basis rate is lowered the insured shall receive the benefit of the same reduction upon the lowered rate, but if the basis rate is raised in any case, said co-insurance clause shall be void, as to said policy although the insured has received the benefit of the reduced rate;

"*Provided further*, That said co-insurance clause shall apply only to cities and towns in this State having a population of more than 15,000 by the census of 1900 or any subsequent Federal census.

"§ 2. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it."

Acts of Tennessee, 1901, Chapter 141.

§ 1. **Failure to pay loss.**— That the several insurance companies of this State, and foreign insurance companies and other corporations, firms or persons doing an insurance business in this State, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; * Provided, That it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy; and, provided, further, that such additional liability within the limit prescribed shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss and injury thus entailed.

§ 2. **Penalty on policy holders when suits on policies not brought in good faith.**— * * * That in the event it shall be made to appear to the court or jury trying the cause that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms or persons in a sum not exceeding twenty-five per cent of the amount of the loss claimed under said policy; Provided, that such liability, within the limits prescribed shall, in the discretion of the court or jury trying the cause, be measured by the additional expense, loss or injury inflicted upon said insurance companies, corporations, firms or persons by reason of said suit.

TEXAS.**Sayles' Texas Civil Statutes, 1897, Volume 2.**

Art. 3089. **Policy shall be considered a liquidated demand.**— A fire insurance policy, in case of a total loss by fire of property insured shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provisions of this article shall not apply to personal property.

* It is doubtful whether this penalty is constitutional and valid. See "Payment of Loss," Rule 14, note, p. 356.

Art. 3096cc. That any provision in any contract or policy of insurance issued or contracted for in this State, which provides that the same shall be void, or voidable, if any misrepresentations of false statements be made in proofs of loss or of death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made, and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, and that the insurance company was thereby misled and caused to waive or lose some valid defense to the policy. (In effect July 1, 1903.)

VERMONT.

Statutes, 1894.

§ 4214. Policy not to limit time of action to less than one year; exceptions.— No policy of fire, life or accident insurance issued or delivered in this state by an insurance company doing business therein shall contain a condition or clause limiting the time of commencement of an action on such policy to a period less than twelve months from the occurrence of the loss, nor a condition or clause making an award by appraisers, fixing the amount of the loss of the insured or beneficiary under such policy, a condition precedent to the bringing or maintenance of an action on such policy; and any such clauses or condition shall be null and void. This section so far as it relates to a limitation of time for the commencement of such action, shall not apply to policies issued by a domestic mutual fire insurance company, the charter of which provides a limitation of time for bringing actions upon the policies issued thereby. (As amended by Laws of 1898, No. 80.)

Laws of 1898, No. 79.

§ 1. Reports of fire losses.— It shall be the duty of every fire insurance company or association transacting business in this state to report to the insurance commissioners, within ten days after the adjustment of every loss, the amount of all policies issued by said company on the property destroyed or damaged, the amount paid or payable on account of such loss, and such other information relating to the matter as the insurance commissioners may require.

VIRGINIA.

1 Virginia Code, 1904.

§ 1277a. **Insurers after notice of loss and application in writing to deliver to the insured forms for preliminary proof.**—Whenever any loss or damage is sustained by reason of any peril insured against and notice thereof has been given to the insurer or any agent of such insurer, then upon the written application made to the insurer or any agent of such insurer by the insured or the person to whom the insurance money is payable under the policy or other contract of insurance, it shall be the duty of such insurer within ten days after the said application shall have been made to the said insurer or agent to deliver to the insured or to the person to whom the insurance money is payable under the policy or other contract of insurance forms for such preliminary proof of such loss or damage as may be properly required under the policy or other contract of insurance; and unless such forms shall be so delivered it shall not be necessary for the insured or any person to whom the insurance money is payable as aforesaid to furnish the insurer with any preliminary proof whatever of such loss or damage, anything in the policy or other contract of insurance to the contrary notwithstanding; and the failure or refusal of such insurer or agent of such insurer to so deliver said forms within said ten days shall be deemed a waiver of any condition, stipulation, or provision in the policy or other contract of insurance requiring such preliminary proof. Such written application and such delivery of forms may be made through the mail as well as otherwise; provided, that if made through the mail it shall be registered according to the laws of the United States.

§ 1277b. **Qualifications of arbitrators and umpires to ascertain losses under policies of insurance.**—The arbitrators and umpire selected to ascertain the loss sustained by any claimant upon any policy of insurance on any property in the state of Virginia, shall be citizens and actual residents of the state of Virginia. Said arbitrators and umpire, before acting as such, shall take an oath to faithfully discharge their duties and that they are not in any manner in the employment of any insurance company.

§ 1277c. Be it enacted by the General Assembly of Virginia, That in all cases where policies of insurance have been issued or are hereafter issued by fire insurance companies doing business in this State contain a provision or provisions providing that in case of loss by fire or otherwise less than the amount stated on the face of the policy upon which the premium is paid or only a certain proportion of the value of the

property at the time of the loss, shall be paid under the provisions of said policy, and the amount ascertained to be due, in accordance with the provisions of the policy after the loss occurs, shall be less than the amount upon which the premium was paid, it shall be the duty of the company that issued said policy to refund to, and said company is hereby required to refund to the policy holder or holders the premium paid on the amount which constitutes the difference between the amount stated in the policy upon which the premium was paid and the amount paid thereunder, with interest thereon from the time of payment of such premium. But this act shall not apply to cases in which there is a partial loss by fire and the policy is continued in force as to the residue of the amount named in the policy.

2. When several policies are issued by different companies on the same property, the amount of premium required to be refunded under this act shall be apportioned and may be recovered from the several companies in proportion to the several amounts of said policies.

3. The amounts required to be refunded by fire insurance companies under this act may be recovered by the policy holder or holders in the same manner and by the same proceedings as are now provided by law for the recovery of the amount ascertained to be due under the policy.

Acts of 1899-1900, Chapter 584.

1. * * * **Arbitrators' and umpire's qualifications.**— That the arbitrators and umpire selected to ascertain the loss sustained by any claimant upon any policy of insurance on any property in the state of Virginia, shall be citizens and actual residents of the state of Virginia.

2. * * * **Oath.**— That said arbitrators and umpire, before acting as such, shall take an oath to faithfully discharge their duties and that they are not in any manner in the employment of any insurance company.

WASHINGTON.

Laws of 1897, Chapter LXV.

§ 6. **Valued policy law; face of policy to be paid, when; option to replace, etc.**— Whenever any policy of insurance shall be hereafter written or renewed insuring real property, or any building or structure erected thereon or wholly connected therewith, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured, or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of the loss and measure of damages when destroyed. In case there is a partial destruction of the property insured, no greater amount

shall be collected than the injury sustained: *Provided*, That the insurer shall have the option to repair, rebuild or replace the property lost or damaged with other of like kind and quality if he gives notice of his intention so to do within twenty days after the receipt of notice of loss: *Provided*, Such insurer shall, within thirty days from the receipt of notice above, commence such rebuilding or replacing and shall diligently prosecute the same to completion, and shall pay to the insured the reasonable rental value of the premises, with the buildings thereon, from the date of loss to the date of such completion. [As amended by Laws of 1899, Chapter CXLV, Section 2.]

Code, 1896.

2753. **Unearned premiums.**—In the event of the total destruction on any insured building, on which the amount of the appraised or agreed loss shall be less than the total amount insured thereon, the insurance company or companies shall return to the insured the unearned premium for the excess of insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid.

WEST VIRGINIA.

Code, 1899, Chapter 34.

18a. **Liability of fire insurance companies in case of loss by fire.**—All fire insurance companies doing business in this State shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon said real estate; and in case of partial loss by fire or otherwise, as aforesaid, of the real estate insured, the basis upon which said loss shall be computed, shall be the amount stated in the policy of insurance effected upon said real estate, and the insured shall have the right to enforce his claim for said loss in any court having jurisdiction.

WISCONSIN.

1 Sanborn and Berryman's Statutes, 1898.

§ 1941-42. **Preparation of standard form.**—The commissioner of insurance shall prepare and file in his office immediately after these statutes take effect a printed form in blank of a policy of fire insurance containing the provisions, agreements and conditions specified in the following sections, omitting sec-

tion numbers from the printed policy; and such form shall be known as the Wisconsin Standard Fire Insurance Policy. (Here follows the form. See page 487.)

§ 1941-64. Applicable to what companies; variations, form of.—No fire insurance company, corporation or association, except township mutual insurance companies, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy on property in this state, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with the printed form of contract or policy so filed in the office of the commissioner of insurance as provided for in sections 1941-42 to 1941-63, and no other or different provision, agreement, condition or clause shall in any manner be made a part of said contract or policy, or be endorsed thereon or delivered therewith, except as follows, to wit:

1. The name of the company, its location or place of business, the date of its incorporation or organization and the state or country under which the same is organized, the amount of paid-up capital stock, whether it is a stock or mutual company, the names of its officers, the number and date of the policy, and, if it be issued through a manager or agent of the company, the words, "This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at _____" may be printed on policies issued on property in this state. "All policies shall be countersigned by an individual agent." [As amended by Laws of 1905, Chapter 102.]

2. Printed or written forms of description and specification or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for) may be written upon or attached or appended to any policy issued on property in this state.

3. A company, corporation or association organized or incorporated under and in pursuance of the laws of this state, or elsewhere if entitled to do business in this state, may, with the approval of the commissioner of insurance, if the same is not already included in the standard form as provided for in said sections, print on its policies any provision which it is required by law to insert therein, if such provision be not in conflict with the laws of this state or of the United States, or of the provisions of the standard form provided for herein, but any such provision shall be printed apart from the other provisions, agreements or conditions of the policy, and in type not smaller than

the body of the policy, and under separate titles as follows: "Provisions required by law to be stated in this policy," and be a part of said policy.

4. There may be indorsed on the outside of any policy herein provided for the name, with the word "agent" or "agents," and place of business of any insurance agent or agents, either by writing, printing, stamping or otherwise.

5. Where two or more companies (each having previously complied with the laws of this state) unite to issue a joint policy there may be expressed in the heading of such policy the fact of the severalty of the contract; also the proportion of premium to be paid to each company and the proportion of liability which each company agrees to assume. And in the printed conditions of such policy the necessary change may be made from the singular to the plural number when reference is had to the companies issuing such policy.

§ 1943. **Statement as to value of realty.**— Whenever any policy of insurance shall be written to insure real property and the property insured shall be wholly destroyed, without criminal fault on the part of the insured, or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property destroyed when insured and the true amount of loss and measure of damages when destroyed.

§ 1943a. **Co-insurance clauses.**— No fire insurance company doing business in this state shall issue any policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property, if within the amount of the insurance for which premium is paid, and no such company shall require the use of any so-called co-insurance clause or rider to be attached or made a part of any policy except at the option of the insured, and every such company shall give to every applicant for insurance the rate of premium demanded with and without such clause or rider. The commissioner of insurance, upon evidence furnished to him that any such company has failed when requested to furnish any applicant for insurance such separate rates, shall forthwith revoke the license of said company and all its agents. If any company which violates any provision of this section is incorporated under the laws of this state such violation shall be cause for forfeiting its charter, and the attorney-general shall institute proceedings to have such forfeiture declared.

§ 1945d. **Magistrate's certificate of loss.**— Whenever any policy insuring property against damage or loss from any cause

shall require the insured, in case of loss or damage to the insured property, to furnish the insurer a certificate or statement of a magistrate or notary public concerning the property insured or the loss or damage thereto, it shall be a compliance with any such provision to furnish a certificate or statement, conforming to the requirements of the policy in other respects, of any magistrate or notary public residing in the county where the loss or damage occurred, who shall not be interested in the claim or related to the insured.

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